No. 80-1292

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GILBERT P. JOHNSON and HERVEY M. JOHNSON, individually and derivatively on behalf of Penn Eastern Development Company,

Petitioners,

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY SALWEN, and PENN EASTERN DEVELOPMENT COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals deny petitioners a fair appeal by refusing to allow them time to obtain half of the lengthy trial transcript, necessary to their appeal, which petitioners had ordered and arranged to pay for and which was delayed only because of that Court's orders to the reporter to expedite criminal transcripts? Alternatively, does this departure from the accepted course of appellate proceedings call for an exercise of this Court's supervisory power?

2. Did the refusal of the courts below to allow petitioners to amend or supplement their Complaint, despite the absence of any prejudice to respondents and under circumstances which (as Judge Rosenn noted in dissent) barred a large part of petitioners' proof, conflict with *Foman v. Davis*, 371 U.S. 178 (1962), and the decisions in other Circuits, and impermissibly restrict the scope of F.R.Civ.P. Rule 15?

3. Did the Court of Appeals majority's reading of the Delaware "business judgment rule" establish a burden-of-proof rule for diversity cases in the Delaware Federal courts different from that applied in the Delaware State courts, in violation of *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939)?[1]

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[1] *Parties Below.* The caption of the case in this Court lists all of the parties to the proceedings leading to the Court of Appeals' opinion (App. 1-30; 629 F.2d 287) of which review is sought here. The Court of Appeals rendered two other opinions on separate appeals, which are not involved here. Petitioners' counsel, Myron M. Cherry, was an additional party to one (App. 32-38; 629 F.2d 302). The District Judge, Hon. Daniel H. Huyett, 3rd, was an additional nominal party to the other (App. 41-43), which is unreported.

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In The

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October Term, 1980

GILBERT P. JOHNSON and HERVEY M. JOHNSON, individually and derivatively on behalf of Penn Eastern Development Company,

Petitioners,

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY SALWEN, and PENN EASTERN DEVELOPMENT COMPANY,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR CERTIORARI

OPINIONS BELOW

The Court of Appeals' opinion and Judge Rosenn's dissent, App. 1-30, appear at 629 F.2d 298 (3d Cir. 1980).[2]

[2] The Court of Appeals rendered two other opinions (of which petitioners do not seek review) on other, separate appeals in this case. One, App. 32-38, is reported at 629 F.2d 302 (3d Cir. 1980). The other, App. 41-43, is unreported.

JURISDICTION

The Court of Appeals' opinion was filed on July 31, 1980. Rehearing and rehearing *en banc* were denied on September 3 and October 2, 1980, respectively. App. 45-46. On November 27 and December 22, 1980 petitioners' time to seek certiorari was extended, first to December 31, 1980 and then to January 30, 1981. Jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V; 28 U.S.C. §§ 753, 1291; F.R.App.P. Rule 10; and F.R.Civ.P. Rule 15 appear at App. 56-65.

STATEMENT OF THE CASE

Nature Of The Case

Petitioners (plaintiffs below) own 47% of Penn Eastern Development Company, a Delaware corporation engaged in real estate development in Pennsylvania. In 1976 plaintiffs brought shareholder derivative claims against respondents (defendants below), Penn Eastern officers and directors who own or control 53% of Penn Eastern and thus also control The Village Center, Ltd., a limited

partnership in which Penn Eastern is the sole general partner. Plaintiffs charged that between 1973 and late 1975 defendants had repeatedly abused their control position by forcing a series of transactions which preserved that control but crippled both businesses. These transactions included a loan on terms defendants knew would leave Penn Eastern insolvent within a year; the auction sale of a major corporate asset for barely a third of its value; and the issuance of additional stock to a defendant for substantially less than plaintiffs had offered for the same stock.[3]

Defendants are still in control. They conceded that their actions were motivated in part by their insistence on preserving control.[4] Though plaintiffs were barred from so proving, that insistence ultimately led to the loss of Penn Eastern's only active project and major remaining asset, the shopping center which Village Center had been organized to hold. App. 18-19.

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[3] See App. 3-4, 23-24. The Complaint (Dkt. 1, 60) alleged that defendants' conduct violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), as well as their common-law fiduciary duty. Jurisdiction was invoked on both diversity (28 U.S.C. § 1332) and federal question (15 U.S.C. § 78aa; 28 U.S.C. § 1331) grounds. After the decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), the § 10(b) claims not based on actual deception or nondisclosure were dismissed. The Complaint also pleaded fraud and § 10(b) claims concerning two defendants' alleged misrepresentation of the value of realty they had transferred to Penn Eastern in return for stock at the time of its 1968 formation.

[4] For example, one defendant admitted that he would have rejected any proposal by plaintiffs involving a shift in control, even if the proposal would have met all of Penn Eastern's cash needs. See *Tr.* 38/95-96. Another conceded that control was a factor in his vote on the challenged loan. *Tr.* 43/63. Defendants stipulated in the Pretrial Order (Dkt. 146) that they "were opposed to the issuance of stock to [plaintiffs] which would give [plaintiffs] control of Penn Eastern."

A. The Pretrial Events And The "Post-1975" Amendment.

Because of the steadily worsening decline of Penn Eastern and Village Center in defendants' hands,[5] plaintiffs desired a prompt trial. A May 2, 1977 date was set. But the trial judge, who said that he did not want to try the case and knew that on May 1 Village Center had gone into default on the $3 million shopping center mortgage, refused to proceed. Instead he pressured plaintiffs to settle on defendants' terms, refusing to rule on plaintiffs' motion *in limine* (made in order to avoid a mistrial) to bar anticipated prejudicial matter from defendants' opening statements to the jury.[6]

After two days of this pressure, trial began. Defendants opened as expected, and plaintiffs reluctantly sought a mistrial. After five more days of settlement pressure, during which he threatened to delay trial for "three or four years" if plaintiffs would not settle, the judge granted the mistrial. Though he had set aside ample trial time and another jury was available, he carried out his threat by refusing to go forward or even set

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[5] Defendants had been enjoined from further hypothecating Penn Eastern's assets. Though they failed to overturn the injunction, Dkt. 138, when they later violated it the trial judge refused to take any action. Dkt. 168, 170, 172, 174, 181, 185. Penn Eastern and Village Center are now near collapse, unless defendants can be ousted and damages recovered.

[6] JA 75-76. Defendants (who filed no counterclaim) demanded settlement terms far beyond what they could obtain even from a trial. But the judge refused to entertain plaintiffs' counterproposals. His "settlement fever" (App. 9) went on for almost two years. As the judge later made explicit, it arose from his fixed view—arrived at long before the merits were heard—that plaintiffs, "out of touch with reality" and "unable to reason," should not have filed suit and thereby caused a "personal tragedy" for defendants, "fine gentlemen" of "high character." JA 49-52, 61-65, 72-89.

another trial date. JA 75-76. His coercive tactics (coupled with growing hostility as plaintiffs failed to capitulate) continued for nearly two years, through several abortive trial settings and a second mistrial caused by his previously threatened insistence on interrupting plaintiffs' case.[7]

Meanwhile, as the judge knew, Penn Eastern and Village Center were deteriorating rapidly. By late 1977 Village Center had filed a Chapter XII bankruptcy petition. But defendants were unable to propose and fund a reorganization plan; adamant on retaining control, they would not give plaintiffs the necessary authority. In May 1978 the petition was dismissed. At this point foreclosure on the shopping center mortgage was imminent. Plaintiffs offered to provide the necessary funds if defendants would yield control, not to plaintiffs but to an independent, neutral receiver. Again defendants refused.[8]

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[7] App. 16-18; JA 52-55, 63-66, 77-91. Delays and mistrials were not the judge's only weapons to coerce settlement. Another was refusal to act, as with defendants' violation of the injunction (p. 4 n. 5 *supra*) and plaintiffs' receivership motions (n. 8 *infra*). The judge even made use of the Chicago residence of plaintiffs' trial counsel. The case was pending in Philadelphia; defendants and their trial counsel were local residents. Twice, after heavy settlement pressures failed, the judge put counsel on 24 hours' trial standby, but refused to allow plaintiffs' counsel to go to Chicago (a two-hour plane flight). One of these occasions lasted for two weeks, during which defense counsel went about their business while plaintiffs' counsel was forced to wait in a hotel room, unable to return to his office. JA 63-65.

[8] JA 80-84; Dkt. 191, 201. Defendants also opposed plaintiffs' requests that the trial judge take action. Before the hearing on plaintiffs' second request, the judge had again pressured plaintiffs to settle on defendants' terms. When plaintiffs declined, he refused to grant relief. Plaintiffs pointed out that if the shopping center were lost it would be impossible to set-

(Footnote continued on following page)

In August 1978 the shopping center was foreclosed upon and sold. Plaintiffs then moved in writing to add the 1977-78 events to the Complaint, both as further liability claims and as demonstrating defendants' ongoing insistence upon control despite the damage to Penn Eastern. As Judge Rosenn noted, plaintiffs acted promptly, defendants had been on notice of the amendment, and the trial judge had said he would allow an oral amendment at trial. Nonetheless the amendment was refused as to liability because it might delay trial. App. 18, 22.

Then came the second mistrial. App. 18. Long before the new trial date, plaintiffs refiled the amendment. But the judge "held it without disposition for the next three months" and then refused it again (and excluded plaintiffs' proof at trial), ruling that it would prejudice defendants and might delay the trial. App. 18-19. As Judge Rosenn observed, this was not true[9] and, even if it had

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[8] *continued*
tle. The judge then suggested that he might further consider a receivership. With his knowledge, plaintiffs brought two experts (one from Florida) to testify on the issue. Defendants then argued that settlement would be more likely if the shopping center were lost, since that might make a judgment for plaintiffs less meaningful. The judge, agreeing, let the experts wait in court for a full day and then refused to hear them. JA 51, 59-60, 84-87.

[9] *First*, even defendants had claimed prejudice only on the ground that the amendment would require three additional witnesses. Dkt. 248. But all these witnesses "were under the defendants' control." App. 21. *Second*, any possible prejudice "disappeared after the . . . [second] mistrial and subsequent retendering of the amendment more than three months prior to the rescheduled trial date. . . ." App. 21. We note that the trial judge's ruling occurred on the same day he refused a request by the Chief Judge of the District Court—before whom, using a recently adopted local procedure, plaintiffs had placed his coercive conduct—that he reassign the case. JA 55-57, 66-68, 127-30.

been, "was not due in the slightest to the plaintiffs' lack of diligence or good faith," but "solely to the [judge's] failure . . . to act on plaintiffs' timely filed motion." App. 21-22.

As his threats and coercive tactics failed to yield a settlement on defendants' terms, the judge had become openly hostile to plaintiffs (while defendants were "fine gentlemen" for whom the suit was a "personal tragedy"). JA 48-66, 90-91. After the second denial of leave to amend, plaintiffs moved for recusal. Recusal was denied, and the Court of Appeals denied mandamus on unique Third Circuit procedural grounds. App. 41-43.

B. The Trial And The "Negligence" Amendment.

As on appeal, the lack of transcript bars an adequate showing here of the extent to which the judge's "intense animosity" (JA 191) and "blatant hostility" (JA 193) to plaintiffs dominated the 72-day trial.[10] His antagonism went far beyond his demeanor—"harsh and accusatory" toward plaintiffs but unfailingly solicitous toward defendants (JA 203-04, 219-20)—to baiting and intimidation of plaintiffs' counsel[11] and a pattern of rulings designed to

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[10] See pages 9-10 *infra*. The text quotations are from affidavits submitted by a retired senior partner at Davis Polk & Wardwell and former law clerk to Judge Learned Hand (JA 190-91) and a military police colonel with 18 years of experience observing trials. (JA 192-93). Other affiants included a Pennsylvania real estate appraiser and frequent expert witness (JA 198-99) and two persons who assisted plaintiffs' counsel during the trial (JA 200-217, 218-23). All contained similar descriptions of the judge's behavior during trial.

[11] "Time and time again" plaintiffs' counsel "would patiently and politely argue his point only to have the judge vilify him." JA 192-93. The judge threatened plaintiffs' counsel with contempt, arbitrarily excluded one of his assistants from the courtroom, and disparaged him before the jury (which could hardly have failed to note what was happening). JA 166, 204-

(Footnote continued on following page)

truncate plaintiffs' proof while leaving defendants free to do as they wished.[12]

One crucial ruling concerned defendants' reliance on the "business judgment rule." They asserted that their actions had been good-faith business decisions. Of course this "presume[s] that judgment—reasonable diligence—has in fact been exercised." 3A FLETCHER, CYC. CORPS. (Perm.Ed. 1975), § 1039. Plaintiffs therefore sought to introduce previously designated deposition testimony that defendants had not analyzed the transactions involved, but had simply voted automatically against plaintiffs.[13] The judge refused, on the ground that "negligence" was not in issue. Plaintiffs then sought leave to amend the Complaint to add that legal theory. No new witnesses were required. Asked to comment on any possible prejudice, defendants said only that they

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[11] *continued*
05, 215-17. Defendants seized upon this, accusing counsel of bad faith at every turn and using the lack of transcript to their advantage. When plaintiffs' counsel protested, the judge refused to allow the reporter to read his notes; even when transcript was later obtained, he refused to correct rulings he had expressly based on a mistaken view of the record. JA 185-87, 199, 205-09, 213.

[12] Many of the rulings, premised on F.R.Ev. Rule 403, recalled the judge's earlier threat (JA 66) to use his discretionary power against plaintiffs whenever possible. For example, the judge barred opinion testimony from plaintiffs, but not defendants; stringently limited plaintiffs' cross-examining time, but not defendants'; barred plaintiffs from introducing crucial evidence that the chief defense witness had testified falsely; refused to allow plaintiffs to challenge defendants' version of a Board meeting (which in closing defendants then claimed was "undisputed"); and, on what he termed the "most critical factual issue," refused to allow the testimony of two bank officers to support a witness whom defendants had sharply attacked.

[13] Dkt. 321. For example: "Q. Did you feel an obligation . . . to analyze financial information that was given to you in connection with loans? A. Obviously, I didn't take the time to do that."

might wish to recall two prior witnesses, both readily available.[14] Without asking plaintiffs to respond, the judge denied the amendment on grounds of delay and "actual prejudice."[15]

C. The Denial Of A Transcript.

Despite plaintiffs' requests, during trial transcript was rarely available. When trial ended, less than a third of the 72 trial days had been transcribed. JA 15-20. Plaintiffs ordered and arranged to pay for a full transcript under F.R.App.P. Rule 10(b). But because of Court of Appeals orders that he expedite criminal transcripts, the reporter estimated that he would need six to nine months to finish the transcript.

This left plaintiffs with no appeal record. Two weeks after trial, the judge—without warning, notice or hearing—had summarily barred their trial counsel from the District Court.[16] That *ex parte* order was later over-

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[14] *Tr.* 43/111-14. One witness, a plaintiff, was present throughout the trial. The other, an expert, had his office ten minutes from the courtroom. *Id.* Defendants had long known of the deposition testimony, and the amendment was tendered immediately before a previously scheduled four-day recess.

[15] *Tr.* 43/119. Nevertheless the judge allowed defendants to offer evidence on the issue and argue it in closing. *Tr.* 70/35-36, 44-45. When plaintiffs sought equal treatment, he continued to insist that the issue "was not part of this case" and refused to instruct the jury concerning it. *E.g.*, *Tr.* 68/96.

[16] After the jury verdict in their favor, defendants had filed a lengthy petition for fees and costs. Plaintiffs submitted detailed affidavits denying its allegations. Dkt. 398. The judge set a hearing, and then cancelled it pending plaintiffs' appeal. Dkt. 399. Two days later—without warning, and with nothing pending before him—he published an *ex parte* Memorandum adopting many of defendants' contested allegations, violently attacking plaintiffs' counsel, and ordering the Clerk to strike counsel's name of record. Dkt. 400. He also instructed the Clerk to refuse to file papers signed by counsel on plaintiffs' behalf.

turned. App. 32-40. But since interim relief was denied, App. 54, and their local counsel was not familiar with the course of the trial, plaintiffs could not develop an alternate appeal record under F.R.App.P. Rule 10(c) or (e). Plaintiffs accordingly sought leave to submit their briefs and appendix after the transcript was complete. Relief was denied. App. 51-53. Plaintiffs then sought an order directing the reporter to expedite the transcript. Again relief was denied. App. 55. In the end plaintiffs—severely prejudiced, as they repeatedly urged—had to brief and argue their appeal on a disjointed transcript covering only half the trial days.[17]

[17] See, *e.g.*, Emergency Motion, Oct. 22, 1979; Brief for Gilbert Johnson, p. 49; Brief for Hervey Johnson, p. 28. The transcript was disjointed because the reporter did not transcribe consecutive days. Both during and after trial, his extremely limited time forced plaintiffs to pick and choose, selecting those trial days which seemed most important. Most of these selections were made during trial, and reflected trial rather than appeal needs.

REASONS FOR GRANTING THE WRIT

Plaintiffs have only sought a fair day in court. They have not had it. The arbitrary denial of leave to amend truncated their claims. Point II *infra*. They were forced to bear a burden of proof directly contrary to Delaware law—and now imposed on the Delaware Federal courts, in violation of *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Point III *infra*. And they were denied the basic requisite of a fair appeal, a trial transcript they were fully prepared to obtain but which the Court of Appeals, placing the demands of its criminal docket above their rights as civil appellants, would not give them time to procure. Point I *infra*.

We believe that each of these errors singly merits the attention of this Court. We observe, however, that the errors reinforced one another. The lack of transcript infected the entire appeal, not only preventing plaintiffs from raising many claims of error but also seriously impairing their ability to argue the claims which they could raise. Similarly, as Judge Rosenn observed (App. 23-24), but for the erroneous denial of leave to amend plaintiffs might well have met even the improper burden of proof imposed by the trial court. Each of these errors warrants relief. Together, they effectively deprived plaintiffs of any meaningful hearing at all.

I.

THE DENIAL OF A TRIAL TRANSCRIPT DEPRIVED PLAINTIFFS OF A FAIR APPEAL

We have no quarrel with the importance of criminal appeals. But here the Court of Appeals would not even

allow plaintiffs to "wait in line," denying them enough time to obtain a transcript delayed only by its own orders to the reporter to expedite criminal cases. That violated plaintiffs' rights as civil appellants and seriously undermined evenhanded judicial administration.

First. Only an adequate record "makes any appellate review meaningful." *Gardner v. California*, 393 U.S. 367, 368 (1969). Usually its basic element is a trial transcript, both to disclose error and to permit effective advocacy. *Gardner, supra*, 393 U.S. at 369-70; *Hardy v. United States*, 375 U.S. 277, 288 (1964) (*per* Mr. Justice Goldberg and three other Justices). That was emphatically true here, where a transcript was readily available, plaintiffs were fully prepared to pay for it, and the trial judge's egregious ouster of their counsel had deprived them of any other means of developing the record.[18]

Even in the context of free criminal transcripts (where this Court has been concerned to protect the public fisc from needless outlays, *Draper v. Washington*, 372 U.S. 487, 495-96 (1963)), when "a transcript was in fact available and could easily have been furnished" the Court has "refused to consider any alternatives." *Britt v. North Carolina*, 404 U.S. 226, 229 n. 4 (1971); *Long v. District Court*, 385 U.S. 192, 194-95 (1966). Nor could alternatives have sufficed in a complex, lengthy civil

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[18] Pages 9-10 *supra*. Obviously plaintiffs could not be required to submit to an *ex parte* reconstruction at someone else's hands, particularly given the "blatant hostility" (JA 193) of the trial judge. *Chessman v. Teets*, 354 U.S. 156, 165 (1957). And one cannot fairly be required to rely on trial notes—often unavailable because of the large number of sidebar conferences—or memory to reconstruct some thirty-five full trial days. *Britt v. North Carolina*, 404 U.S. 226, 229 n. 4 (1971).

suit such as this, even had they been available. Plaintiffs' claims that the trial as a whole was unfair, both because it was tainted by the judge's overt hostility and because of his abuse of F.R.Ev. Rule 403 through dozens upon dozens of evidentiary rulings eviscerating plaintiffs' proof, are classically the kinds of claims which cannot be adequately presented except on a full transcript. *Draper v. Washington*, 372 U.S. 487, 496-97 (1963); *Mayer v. City of Chicago*, 404 U.S. 189, 198-99 (1971).[19] Equally was the transcript necessary to show the full extent to which the erroneous denial of leave to amend deprived plaintiffs of a fair opportunity to meet defendants' own arguments.[20] Pages 17-23 *infra*. And without the full transcript, plaintiffs could not even attempt to argue that on the record as a whole they had met not

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[19] Plaintiffs directly raised these claims (and the prejudice caused by the lack of transcript) on appeal. See Brief for Hervey Johnson at 18-28, 56-59; Brief for Gilbert Johnson at 49. The lack of transcript also impaired plaintiffs' ability to urge the trial judge's conduct of the trial in support of their recusal claim. Whatever may be the case as to individual rulings (see App. 8), if the judge's overall conduct during trial betrays "positive hostility to plaintiff and his case" recusal is clearly required. *Wolfson v. Palmieri*, 396 F.2d 121, 124 (2d Cir. 1968); *Whitaker v. McLean*, 118 F.2d 596 (D.C. Cir. 1941); *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966); *Reserve Mining Co. v. Lord*, 529 F.2d 181, 184-86 (8th Cir. 1976). With a disjointed transcript covering in random fashion only half the trial days (p. 10 n. 17 *supra*), plaintiffs could not fairly present these points.

[20] For example, even though he had previously granted a mistrial on that ground (Dkt. 125), throughout the trial the judge permitted defendants to argue that their acts were justified because plaintiffs were seeking control of Penn Eastern—part of a so-called "unclean hands" defense which he eventually struck, though refusing to give a curative instruction to the jury. Even on the limited transcript available, Judge Rosenn perceived and noted in dissent (App. 23-24) that the denial of leave to amend largely prevented plaintiffs from effectively rebutting this argument.

only a fair standard of proof, but also the harsh burden of proof erroneously imposed on them. Pages 23-29 *infra*.

Second. Were this a criminal case involving a demand for a free transcript, the cases cited above would plainly require reversal and remand for reconsideration on a proper record. The arbitrary denial of a transcript is no less wrongful, and that relief is no less required, because this is a civil case where plaintiffs are perfectly willing to pay for their transcript. Though this Court's transcript decisions began with indigent criminal defendants, they sound in due process as well as equal protection. *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1974); *Chessman v. Teets*, 354 U.S. 156, 165 (1957).[21] The right to a transcript on appeal goes to the heart of the "meaningful opportunity to be heard" which underlies due process, *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). An appeal without an adequate record is simply not "meaningful." *Gardner v. California*, 393 U.S. 367, 368 (1969). Obviously that is as true in civil as in criminal cases. 9 J. MOORE, FEDERAL PRACTICE (2d Ed. 1980), ¶ 210.05[1].

Plaintiffs seek no special treatment. They are quite willing to pay for their transcript and assume the burden of obtaining it. They urge only that the Court of Appeals could not Constitutionally *deprive* them of the transcript, which was available and which they took all of the requisite steps to procure. Thus the issue is

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[21] Thus several Circuits have invoked due process principles to grant relief where the lack of a transcript stemmed from simple unavailability rather than from an indigent's inability to pay. *United States v. Rosa*, 434 F.2d 964 (5th Cir. 1970); *Parrott v. United States*, 314 F.2d 46 (10th Cir. 1963); *United States ex rel. Westbrook v. Randolph*, 259 F.2d 215 (7th Cir. 1958); *United States v. Knox*, 465 F.2d 1024 (8th Cir. 1972).

narrowly drawn. This case does not require us to ask whether in civil cases there is an "affirmative obligation" to "assure . . . meaningful access to the courts."[22] Rather, here we confront only the fundamental principle that even where the Constitution might not affirmatively confer a right, due process nonetheless forbids its arbitrary deprivation. The Constitution does not confer a right to an appeal. *Abney v. United States*, 431 U.S. 651, 656 (1977). But when one is statutorily granted the procedures employed must be fair, *Burns v. Ohio*, 360 U.S. 252, 257 (1959), and the appellants are entitled to due process. *Cole v. Arkansas*, 333 U.S. 196, 201-02 (1948).[23]

Here both statute and Rule provided plaintiffs with the right to an appeal and to a transcript. 28 U.S.C. §§ 753(b), 1291; F.R.App.P. Rules 10(a), (b). The Court of Appeals directly deprived them of a transcript, and thereby effectively deprived them of an appeal as well. That arbitrary deprivation violated basic due process principles. It also denied plaintiffs equal protection, as binding on the Federal government under the Fifth

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[22] Compare, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971), with *Ortwein v. Schwab*, 410 U.S. 656 (1973); and compare *Ross v. Moffitt*, 417 U.S. 600 (1974), with *Bounds v. Smith*, 430 U.S. 817 (1977). Where relief has been denied (as in *Ortwein* and *Ross*), the reason has been the absence of an affirmative obligation to bend over backwards for fairness' sake. Plaintiffs do not seek to impose any such obligation here.

[23] Similarly, the Constitution may not confer a right to counsel in a civil case. But this Court has recognized that an arbitrary refusal to hear retained counsel in a "civil or criminal" case would constitute a denial of due process. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). And the Court has also recognized the serious due process issues presented by denying a litigant a hearing because of events which are not his fault—the precise effect of the Court of Appeals' action here. *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958).

Amendment as on the States under the Fourteenth. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975). "When an appeal is afforded . . ., it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

Third. Quite apart from Constitutional considerations, the Court of Appeals here radically "departed from the accepted and usual course of judicial proceedings," Supreme Court Rule 17.1(a), by sacrificing plaintiffs' rights as civil appellants to the demands of its criminal backlog.[24] See pages 9-10 *supra*. Surely this Court's directives in *Coppedge v. United States*, 369 U.S. 438, 446 (1962), and *Hardy v. United States*, 375 U.S. 277, 279-80 (1964), were not meant to be applied at the expense of civil appellants, particularly when all plaintiffs sought here was enough time to obtain their transcript. No reason appears why the rights of civil litigants should be sacrificed to the problems of increasing criminal dockets. To the contrary, the Chief Justice has pointedly observed that the increase in Federal criminal cases does not reduce the courts' "obligation . . . to ensure that proceedings are transcribed with dispatch." *Mayer v. City of Chicago*, 404 U.S. 189, 200 n. 1 (1971); see also *Rheuark v. Shaw*, 477 F.Supp. 897, 910 (N.D.Tex. 1979), holding that "docket control problems" do not permit violation of that duty. The applicable statute, 28 U.S.C. § 753(g), provides for

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[24] Other courts have held, as a matter of judicial administration, that the unavailability of a transcript on a civil appeal *per se* warrants reversal for a new trial. *E.g., Calhoun v. United States*, 384 F.2d 180, 183-85 (5th Cir. 1967); *Caffee v. McBee*, 142 S.W.2d 581, 583 (Tex.Civ.App. 1940); *Victory v. Hamilton*, 127 Tex. 203, 91 S.W.2d 697, 700 (1936). *A fortiori* it is strange to deny a transcript when one is available.

additional reporters to meet exigencies caused by transcript demands.

Surely civil litigants are as entitled to fair treatment in this regard as criminal defendants. But plaintiffs were denied it here. Due process and equal protection aside, sound judicial administration in the Federal courts requires that this Court exercise its supervisory power to point out that depriving civil litigants of their rights on appeal is *not* an acceptable way to solve the problem (addressed by the Chief Justice in *Mayer*, *supra*, 404 U.S. at 200) of demands for transcripts in criminal cases.

II.

THE DENIAL OF PLAINTIFFS' AMENDMENTS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AND SUBVERTS THE PURPOSE OF F.R.CIV.P. RULE 15

F.R.Civ.P. Rule 15 is intended "to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham*, 364 U.S. 310, 316 (1960). Its mandate that leave to amend shall be freely given "is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Its purpose, like that of the Rules generally, is "to facilitate a proper decision on the merits" of the entire controversy—not to turn pleading into a "game of skill in which one misstep . . . may be decisive." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The denial of plaintiffs' proffered amendments in this case is in direct conflict with these principles.

First. The trial judge's rejection of plaintiffs' "post-1975" amendment (pages 5-7 *supra*) was egregious error. Judge Rosenn pointedly observed that the sup-

posed "delay" and "prejudice" given as reasons simply did not exist; and even if they had, they stemmed solely from the trial judge's own three-month-long refusal to act on plaintiffs' timely filed amendment. App. 22-23. It hardly befits Rule 15, as Judge Rosenn wrote, "to attribute prejudice from a proposed amendment of the pleadings to the plaintiffs, when the root of the inconvenience to the defendants, if any, is the court's inaction." App. 22. Even the Court of Appeals' majority did not try to justify the trial judge's action. Instead, it held the denial of leave to amend "harmless," on the sole ground that "the [shopping center] foreclosure would not have been admissible under Delaware substantive law in the liability phase of the trial." App. 14. Judge Rosenn correctly explained that this was both plainly wrong and also beside the point. App. 23-24.

To begin with, plaintiffs' amendment sought to raise not the loss of the shopping center *per se*, but rather defendants' conduct in causing the loss by refusing to surrender control even to a neutral receiver.[25] Even

[25] See pages 5-6 *supra*. By limiting itself to the "mere fact" of foreclosure (App. 15), the majority missed this point, though Judge Rosenn grasped it fully. App. 24. While the bare result of a transaction may not prove that the transaction was undertaken in bad faith (though certainly it is startling to be told that the jury in a business judgment case is not entitled to know what happened), it is quite clear that the *motives* of management in undertaking it may be shown by, among other things, their *motives* in other transactions. See *Spain v. Rossiter*, 32 Del. 168, 120 A. 746 (1923). "[T]estimony of prior or subsequent transactions which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 n. 3 (1965); see also *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 704-05 (1948); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 42 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

viewed (as the majority did) solely in the context of their impact on plaintiffs' pre-1976 claims, those events would have gone a long way toward refuting defendants' assertions that they had merely exercised sensible "business judgments" and that their insistence on continued control was not a dominant factor in their decisions. Judge Rosenn put it cogently (App. 24):

> "The jury, without knowledge of the loss of the shopping center, may have been more willing to accept the defendants' version of their exercise of discretion in the management of Penn Eastern's affairs. With knowledge of the loss of the shopping center *and of plaintiffs' admonition to the defendants of the need to act to forestall the impending foreclosures*, the jury might well have found plaintiffs' complaint meritorious. With the complaint amended and the shopping center sold at sheriff's sale, the jury could well have concluded that the decisions made by the defendants were not in Penn Eastern's best interests, *and were not honest mistakes of judgment, but were dictated solely by personal motives of corporate control.*" [Emphasis added.]

By no stretch of the imagination can the exclusion of plaintiffs' proof on this score be termed "harmless." Even as to plaintiffs' pre-1976 claims, as Judge Rosenn said, the denial of leave to amend "taint[ed] the entire trial;" for with the amendment, "the issues would have been drawn more sharply, the basis of plaintiffs' charges concretized, *and the jury might have rendered its verdict for plaintiffs.*" App. 24 (emphasis added). The core of plaintiffs' amendment was not the bare fact of foreclosure, but rather that it could have been averted save for defendants' stubborn determination to maintain control, even at the expense of Penn Eastern's major remaining asset and even where the alternative was not plaintiffs but an independent receiver. Those facts were

plainly relevant. As Judge Rosenn observed, App. 24, their addition might well have enabled plaintiffs even to meet the erroneous burden imposed by the trial judge by convincing the jury that defendants' conduct was "solely" dictated by "personal motives of corporate control." Obviously, excluding those facts seriously damaged plaintiffs' case.

The majority's "harmless error" reasoning also misconceived both plaintiffs' amendment and Rule 15 in another way. The amendment was not meant simply to offer new *evidence* on existing claims—that is not the purpose of pleadings in the Federal system, *Conley v. Gibson*, 355 U.S. 41, 48 (1957)—but to add new *claims* concerning "events . . . since the date of the [original] pleading." Rule 15(d). Had plaintiffs waited until after defendants' commitment to retaining control had led to the loss of the shopping center, plaintiffs could have filed a single complaint covering that as well as the prior events. The purpose of Rule 15(d) is to facilitate amendments toward that end. The goal is to achieve fairness and judicial economy through the trial of *all* claims in a single action, rather than piecemeal litigation. *Conley v. Gibson, supra;* see *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Casually to dismiss the amendment on the theory that plaintiffs could bring a separate suit is to ignore these long-established considerations. It is in no sense "harmless." Plaintiffs' post-1975 claims, though not litigated here, may be wholly or largely unlitigable elsewhere for reasons of collateral estoppel, limitations periods, and the rule against "splitting" causes of action. As Judge Rosenn observed, App. 22 n. 2, to remit plaintiffs to this dubious prospect, possibly depriving them of their right to have those claims heard at all, is plainly neither harmless error nor in keeping with the function of Rule 15.

Second. This is equally true of plaintiffs' "negligence" amendment. Pages 8-9 *supra.* That amendment should not have been necessary at all; the issue it sought to raise had long been in the case by virtue of defendants' "business judgment" defense. Page 8 *supra.* By the same token, it could not have prejudiced defendants, well aware of the issue. Even assuming its necessity, at most the amendment "[did] no more than state an alternative theory for recovery." *Foman v. Davis*, 371 U.S. 178, 182 (1962); see *Sherman v. Hallbauer*, 455 F.2d 1236, 1242 (5th Cir. 1972). It entailed no new witnesses and no surprise. Even defendants claimed no "prejudice" other than a desire to further cross-examine two readily available witnesses.[26]

Plainly this amendment also should have been allowed. The Court of Appeals majority's grounds for precluding it effectively nullify Rule 15. Though paying lip service to the requirement of actual prejudice and the insufficiency of mere delay as a reason for rejecting an amendment, App. 15, the majority[27] nevertheless grounded its ruling upon delay in tendering the amendment, and upon "arguabl[e]" prejudice to defendants from granting it because of that delay. App. 16. But by definition such

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[26] One defendant also raised the prospect that he might be held liable if the amendment were permitted. *Tr.* 43/112-14. Of course this is not "prejudice;" if anything it was a good reason for allowing the amendment. *Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971).

[27] Judge Rosenn's opinion, though strongly indicating the amendment should have been allowed, held that it was unnecessary to reach the point because of "the necessity of preparing for a retrial," and directed the trial court to allow the plaintiffs to tender the amendment "on retrial." App. 25. His opinion was later amended by adding "under my analysis" to the phrase "the necessity of preparing for a retrial," and by deleting the express direction to the trial court. App. 31.

a "delay" is true of *any* in-trial amendment under the third sentence of Rule 15(b).[28] To reject the amendment on those grounds negates that provision. Every other Circuit has held that delay alone is not a sufficient reason to reject an amendment.[29] Every other Circuit has also held that "arguable" prejudice will not do. Only serious, substantial, and actual prejudice will suffice; and that cannot be shown merely "by arguing a technical change in the 'cause of action'"—at most, all that was involved here—"since that merely means 'legal' and not 'actual' surprise."[30]

As to both the "post-1975" amendment and the "negligence" amendment, then, by a 2-1 vote the Third Circuit denied amendments which clearly fell within the express terms of F.R.Civ.P. Rule 15. This Court should

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[28] "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended *and shall do so freely* when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." The next sentence emphasizes that the proper course is to cure any prejudice rather than truncate the litigation: "The court may grant a continuance to enable the objecting party to meet such evidence." Here that was unnecessary. A four-day recess had already been scheduled. Page 9 n. 14 *supra*.

[29] *E.g., Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973). See 3 J. MOORE, FEDERAL PRACTICE (2d Ed. 1980), ¶ 15.08[4] at page 15-102 and cases cited. Of course this is particularly true here, where the "delay" stemmed only from plaintiffs' justifiable belief that the issue was already in the case. That would seem to be the paradigm of a proper Rule 15(b) situation.

[30] 3 MOORE, *supra* n. 29, ¶ 15.14 at pages 15-180 to 15-181, and cases cited. See, *e.g., Hodgson v. Colonnades, Inc.*, 472 F.2d 42, 47-48 (5th Cir. 1973).

correct the Third Circuit's misapplication of that Rule, which seriously damages its efficacy.

III.

THE IMPOSITION OF THE BURDEN OF PROOF ON PLAINTIFFS IN THIS CASE VIOLATES CITIES SERVICE OIL CO. v. DUNLAP, 308 U.S. 208 (1939)

Having wrongly excluded a large part of plaintiffs' proof (pages 17-22 *supra*), the trial judge and the Court of Appeals' majority then erroneously "impose[d] a burden [of proof] on the plaintiffs not consistent with Delaware law." App. 30.[31] This being a diversity case, that violated *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). Unfortunately, the error is substantial and continuing. It involves the Delaware business judgment rule, of major importance to the Nation's business community, and it applies perforce to the Delaware Federal courts (in the Third Circuit, 28 U.S.C. § 41) where much business diversity litigation is conducted.

First. Generally, the business judgment rule imposes on the plaintiff the burden of proving that the directors' decision he challenges was improperly arrived at, and heightens the burden by presuming that the decision involved a good-faith exercise of judgment. 3A FLETCHER, CYC. CORPS. (Perm. Ed. 1975), § 1039. But where self-dealing or other personal interest on the

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[31] While the burden of proof error in itself requires correction, it also further impeaches the majority's contention that the denial of leave to amend was "harmless." As Judge Rosenn noted, App. 24, if the "post-1975" amendment had been allowed plaintiffs "could well" have met even the majority's erroneous proof standard. Without the amendment and the light it cast on defendants' motives (page 19 *supra*), the majority's burden was virtually insurmountable.

directors' part is demonstrated, the rule does not apply. "[W]hen the persons, be they stockholders or directors, who control the making of a transaction and the fixing of its terms, are on both sides, *then the presumption and deference to sound business judgment are no longer present.*" *David J. Greene & Co. v. Dunhill Int'l, Inc.*, 249 A.2d 427, 430-31 (Del. 1969); see App. 27. Rather, the directors must then prove "not only that the transaction was in good faith, but also that its intrinsic fairness will withstand the most searching and objective analysis." *Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 82, 90 A.2d 660, 663 (1952); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721-22 (Del. 1977).[32]

Second. In a control-retention case like this one, "the assignment of the burden of proof . . . is crucial." *Note*, "Buying Out Insurgent Shareholders With Corporate Funds," 70 Yale L.J. 308, 317 (1960). Here defendants should have borne that burden. Transactions involving avoidance of the loss of corporate control are paradigms

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[32] In light of these Delaware decisions, it is difficult to fathom the majority's statement here (App. 11) that the business judgment rule "validate[s] certain transactions despite conflicts of interest." The Delaware courts "do not understand . . . [the rule] to have any application whatever" where a conflict of interest is present. *Gottlieb, supra*, 90 A.2d at 663; see Arsht, "The Business Judgment Rule Revisited," 8 Hofstra L.Rev. 93, 115-16 (1979). In this diversity case, the majority was not at liberty to fashion a contrary notion of how the rule ought to work. See *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178 (1940). Nor is the majority's notion supported by its attempt to discern a conflict of interest in every situation, including a director's desire to "enhance corporate profits." App. 11. The majority distinguishes "an ordinary fiduciary," who "may not have the slightest conflict." *Id.* But a trustee's desire to invest wisely (and so keep his post and his trustee's fees)—which has never been thought to create a "conflict"—is not in the least different from a director's desire to enhance profits. The majority's entire page of argument on this score is devoid of any reference to Delaware law.

of those involving personal interests, so that when challenged on a control-retention decision the directors bear the burden of proof. *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548, 554 (S.Ct. 1964); *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405, 409 (S.Ct. 1962). Objectively, each transaction at issue here posed for defendants a direct choice between keeping control or losing it. App. 3-4, 23-24. Subjectively, defendants themselves conceded that maintaining control was a factor in their decisions.[33] Where both objectively and subjectively their decisions involved the choice between keeping or losing control, they were "of necessity confronted with a conflict of interest," and the burden fell upon them "to justify [the transactions] as one[s] primarily in the corporate interest." *Bennett v. Propp, supra*, 187 A.2d at 409.

As Judge Rosenn observed, App. 27, *Bennett* "hold[s] that when a transaction involving control of a corporation raises a conflict of interest on the part of the board of directors"—when "the plaintiffs show that an improper purpose—control—was a motive," as defendants admitted here—"the burden is then thrust upon the defendants to . . . [prove] the fairness of the transaction." This is merely what one would expect:

> "Where . . . the objective sought . . . is not merely the pursual of a business purpose, but also to retain

[33] Page 3 *supra*. Thus here again the majority's argument that some attenuated control interest can be hypothesized in every transaction (p. 24 n. 32 *supra*) misses the point. Here defendants' control motive was no hypothesis, but an admitted fact. Here keeping or losing control was the direct consequence of defendants' challenged votes—not, as with the majority's theorizing (App. 11), a hypothetical contingency which might or might not occur as a result of someone else's action. Whatever may be the case in the majority's hypothetical situation, Delaware holds that when control is directly implicated (let alone, as here, admittedly a motive) it is a "mockery" to suggest that its involvement is "merely incidental." Page 26 *infra*.

> control, it has been held to be a mockery to suggest that the 'control' effect of a [decision] in litigation is merely incidental to its primary business objective."

Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769, 776 (Ch. 1967).

Third. Nevertheless the majority here imposed the burden of proof on plaintiffs. It held that plaintiffs had to prove that retaining control was defendants' "sole or primary" motive. App. 13. But as Judge Rosenn pointed out, App. 28, this confuses the burden of proof with the question of ultimate liability. If defendants acted "solely or primarily" to preserve their own corporate control, then they are liable without further ado.[34] That may be the ultimate liability issue. But it has nothing to do with the burden of proof. For sound reasons, Delaware imposes that burden on defendants. Yet here, the majority's holding that plaintiffs must prove defendants' ultimate liability before the burden of proof could shift to defendants is tantamount to holding that defendants never bear that burden; and that is precisely what the majority did, by approving a jury instruction, at the close of the entire case, which continued to impose the burden on plaintiffs. See note 34 *infra*.

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[34] This appears even from the majority's own citations. App. 13. Each of those decisions used the language quoted by the majority *in ruling on ultimate liability*—not in determining who bore the burden of proof. The majority's confusion appears clearly from its reference to a directed verdict. App. 13. A directed verdict motion determines whether plaintiffs' case *on the ultimate merits* is sufficient to go to the jury. But the majority said that if plaintiff survives a directed verdict with a "sole or primary motive" showing, the *burden of proof* then shifts to defendants. It then compounded the confusion. Although plaintiffs did survive a directed verdict motion here (Dkt. 330), in the next sentence the majority upheld the final charge to the jury, which continued to place the same burden of proof on plaintiffs. App. 13. Bluntly, this makes no sense.

Judge Rosenn correctly observed, App. 26-30, that the majority's standard is both unworkable (App. 28-29 n. 6) and contrary to Delaware law. It is unworkable because, since "the facts which indicate . . . motivation . . . are probably accessible only to the directors" (and certainly subject to self-serving protestations of innocence), "to compel the plaintiff to prove . . . intent . . . would impose an almost insurmountable burden." *Note*, "Buying Out Insurgent Shareholders With Corporate Funds," 70 Yale L.J. 308, 317 (1960). That is precisely why *Bennett, supra*—citing that Note—placed the burden of proof on the directors (187 A.2d at 409):

> "We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. *The directors are of necessity confronted with a conflict of interest*, and an objective decision is difficult . . . Hence, in our opinion, *the burden should be on the directors to justify such a purchase as one primarily in the corporate interest.*" [Emphasis added.]

The majority's contrary rule here relies heavily on *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (S.Ct. 1964). App. 12. But as Judge Rosenn noted, App. 28, *Cheff*'s reference to the majority's "sole or primary motive" standard occurs in language dealing with ultimate liability, not with the burden of proof.[35] As to the burden of proof, *Cheff* is quite clear (199 A.2d at 554):

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[35] "Similarly, if the actions of the board were motivated by a sincere belief that the buying out of the dissident stockholder was necessary to maintain what the board believed to be proper business practices, the board *will not be held liable* for such decision, even though hindsight indicates the decision was not the wisest course. . . . . *On the other hand*, if the

(Footnote continued on following page)

> "Our first problem is the allocation of the burden of proof. . . . In *Kors* [*v. Carey*, 158 A.2d 136 (Del. Ch. 1960)], the court merely indicated that the directors are presumed to act in good faith and the burden of proof to show to the contrary falls upon the plaintiff. *However, in Bennett v. Propp, supra, we stated:*
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> " '[. . .] *The directors are of necessity confronted with a conflict of interest* [. . .] [*T*]*he burden should be on the directors to justify such a* [*transaction*] *as one primarily in the corporate interest.*' " [Emphasis added.]

As Judge Rosenn pointed out, *Cheff* thus "fully and unequivocally reiterated the burden of proof rule . . . announced in *Bennett*," placing the burden squarely on the directors. App. 28. "Nothing in *Bennett* or *Cheff* suggests that the plaintiff must first prove that the [directors'] sole or primary purpose . . . was . . . to retain control over the corporation." *Id.* To the contrary, the *Cheff/Bennett* requirement that *the directors* prove the challenged transaction *was* "primarily in the corporate interest" is patently at war with the majority's holding here that *plaintiffs* must prove it *was not.*[36]

Delaware has adhered to *Cheff* and *Bennett. E.g., Petty v. Penntech Papers, Inc.*, 347 A.2d 140, 143 (Del. Ch. 1975). The majority's contrary holding here establishes an intolerable and wholly unnecessary conflict between

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[35] *continued*
board has acted solely or primarily because of the desire to perpetuate themselves in office, the use of corporate funds for such purposes *is improper.*" 199 A.2d at 554 (emphasis added).

[36] Judge Rosenn added, App. 28-29, that the "unequivocal thrust" of *Bennett* "is that once the record demonstrates that control is implicated in the transaction, a conflict of interest is *ipso facto* created." Here that was true both objectively and subjectively. Page 25 *supra.*

the Court of Appeals (and the Federal courts sitting in Delaware) and the Delaware State courts on this critical burden-of-proof issue. At the very least, after Judge Rosenn alerted it to the dubiety of its view the majority should have stayed its ruling pending resort by the parties to the Delaware courts.[37] In that manner or otherwise, the majority's error must be corrected before serious damage results.

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that a writ of certiorari should issue herein.

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[37] See *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959); *Albertson v. Millard*, 345 U.S. 242 (1953). Delaware has a declaratory judgment procedure, 10 Del. Code § 6501, which would appear adaptable to a prompt resolution of the issue.

APPENDIX

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

v.

SAMUEL J. TRUEBLOOD, ARNOLD E.
TRUEBLOOD, HARVEY I. SALWEN, and
PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson,
individually and derivatively on behalf
of Penn Eastern Development Corporation,
Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 76-1002)

Argued March 18, 1980

Before: SEITZ, *Chief Judge*,
ROSENN and HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 31, 1980)

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OPINION OF THE COURT

SEITZ, *Chief Judge.*

The plaintiffs, Gilbert and Hervey Johnson, appeal from a judgment for the defendants, majority shareholders and directors of Penn Eastern Development Co., in this diversity suit charging the defendants with fraud and breach of fiduciary duty under Delaware law.

I.

The present controversy centers on the conduct of the affairs of Penn Eastern, incorporated in June 1968 as a real estate development company. The plaintiffs, Gilbert and Hervey Johnson, owned a 47 percent interest in Penn Eastern. The defendants, Samuel and Arnold Trueblood and Harry Salwen, collectively owned the controlling 53 percent interest. At its inception, a major asset of Penn Eastern was land known as the "Red Caboose" property owned by the Truebloods and a man named Louis Siana. This property was originally pur-

chased for $48,000 and sold by the Truebloods and Siana to Penn Eastern in exchange for $75,000 of its capital stock.[1]

Penn Eastern was the sole general partner in a limited partnership called The Village Center, Ltd. This partnership was formed for the development of a shopping center which was to be Penn Eastern's sole major asset. Penn Eastern, however, began to develop severe cash flow problems in 1972. In November 1973, the Truebloods proposed acceptance of a loan to the corporation by a Frank Pierce. The plaintiffs opposed this loan, urging that it was not beneficial and that they had the financial resources to loan Penn Eastern the requisite capital. By its terms, however, the plaintiffs' loan would have resulted in a shift in control of Penn Eastern from the Truebloods to the plaintiffs. By a 4-2 vote, the Penn Eastern Board of Directors,[2] rejected the plaintiffs' proposal and accepted the Pierce loan.

The Pierce loan failed to solve Penn Eastern's cash flow problems, and the corporation ran into difficulties meeting the loan repayments. The defendants proposed an amendment to the Pierce loan agreement by which the Red Caboose property would be sold at absolute auction in May 1975. The plaintiffs opposed this action because the real estate market was depressed, and they feared Penn Eastern would sell one of its major assets at less than its full market value. The plaintiffs offered to

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1. The Johnsons each paid $25,000 for their twenty-five shares in Penn Eastern. Samuel and Arnold Trueblood and Siana received 25 shares of Penn Eastern in exchange for their one-third interest in the Red Caboose property. Siana's twenty-five shares were repurchased by the corporation on August 21, 1978. Later purchases of stock by the Johnsons and Harry Salwen resulted in the 47 percent-53 percent split in ownership of Penn Eastern.

2. The Board of Directors was composed of the Truebloods, Salwen, the Johnsons and Rolland Henderson, a non-shareholder director. The Truebloods, Salwen and Henderson voted in favor of the Pierce loan; the Johnsons against it.

tender the payments due on the Pierce loan to avoid auctioning off the Red Caboose property. This proposal was rejected and the property sold.

Penn Eastern's financial condition continued to deteriorate when in November 1975, to shore up Penn Eastern's treasury, the defendants proposed a sale of twenty-one shares of Penn Eastern stock to Arnold Trueblood at the price of $750 per share. The plaintiffs counterproposed that Penn Eastern sell twenty shares of the stock to them at $1,000 per share. This would have resulted in a shift in corporate control to the plaintiffs, and it too was rejected and the sale to Arnold Trueblood approved. Despite the new infusion of capital arising out of the sale of stock, Penn Eastern's financial condition continued to deteriorate.

The plaintiffs filed the present shareholders' derivative action in the district court alleging violation of the federal securities laws and Delaware corporate law.[3] The

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3. The complaint may be broken down into four basic charges:

1. The Truebloods knowingly misrepresented to Gilbert Johnson the value of the Red Caboose property when it was sold to Penn Eastern in 1968 in exchange for Penn Eastern stock.

2. The rejection of the Johnsons' proposed loan and acceptance of the Pierce loan was motivated by the defendants' determination to retain control over Penn Eastern regardless of the corporation's best interests and was accordingly a breach of fiduciary duty.

3. The rejection of the Johnsons' loan in favor of selling the Red Caboose property at absolute auction to meet the payments of the Pierce loan was in the disinterest of Penn Eastern and motivated by the defendants' desire to retain control over it.

4. The rejection of Gilbert Johnson's offer to purchase twenty shares of Penn Eastern stock and acceptance of the Trueblood's loan proposal constituted breaches of fiduciary duty by the defendants.

The issues raised on appeal concern only the state law claims.

complaint sought rescission of the sale of stock to Arnold Trueblood and damages on behalf of Penn Eastern.

During the pretrial and discovery phases of the trial, Penn Eastern, as the general partner of The Village Center, Ltd., filed for reorganization under Chapter XII of the Bankruptcy Act. Penn Eastern attempted to reorganize The Village Center, Ltd. by soliciting additional investments from the limited partners. When this proved unsuccessful, the plaintiffs were notified that no plan would be presented to the Bankruptcy Court, and that court subsequently dismissed the reorganization petition on May 30, 1978, without prejudice. Mortgage foreclosure proceedings were thereafter commenced by the mortgagee of The Village Center's property because Penn Eastern failed to meet its mortgage obligations. The plaintiffs filed an emergency motion for the appointment of a receiver on June 23, 1978, but the motion was denied by the district court on June 26, 1978.

From approximately May 1977 onward, the trial judge assigned to the case made repeated efforts to have the parties reach a settlement. The trial was set to commence on August 21, 1978, but was postponed and a final settlement conference occurred. After it became apparent that a settlement could not be achieved, the trial judge reset the trial date for September 6, 1978. Meanwhile, the multi-million dollar shopping center owned by The Village Center, Ltd. was scheduled for a foreclosure sale on August 23, 1978. The foreclosure took place as scheduled. The plaintiffs had indicated during the summer that should the shopping center be lost, they would seek amendment of their complaint to include its loss as both grounds for liability and damages.

The parties returned to court for trial on September 6, 1978. Although represented by local counsel, the plaintiffs' active trial counsel had offices in Chicago, Illinois. The court did not commence trial, however, and instructed the parties to be available on twenty-four hours'

notice. On September 18, 1978, the Johnsons tendered their proposed amendment to the complaint relating to the loss of the shopping center. This amendment was allowed but only on the issue of damages (the trial was bifurcated as to liability and damages). On September 19, 1978, trial began, but because of numerous interruptions the district court declared a mistrial once more and reset the case for trial. Trial was now fixed for February 20, 1979. The plaintiffs retendered their proposed amendment to the complaint as to liability shortly after the mistrial, but it remained without disposition for the next three months.

In the interval between the September 1978 mistrial and the new trial date, the plaintiffs, concerned over the trial judge's impartiality and his conduct of the trial, informally sought to have the Chief Judge of the Eastern District of Pennsylvania reassign the case. These efforts were unsuccessful. On February 7, 1979, the trial judge again rejected the proposed amendment to the complaint on the ground that it might delay the trial. Plaintiffs thereafter filed a motion on February 15, 1979, to have the trial judge recuse pursuant to 28 U.S.C. §144 (1976), which was denied.

Trial thereafter commenced and lasted seventy-two days. During the course of the trial, plaintiffs petitioned this court for a writ of mandamus pursuant to 28 U.S.C. §1651 (1976) to compel the judge's recusal. Our court denied the petition on June 27, 1979. Trial concluded on July 3, 1979, with a verdict in favor of the defendants. The plaintiffs filed a notice of appeal. After the notice was filed, the district court, without holding a hearing or providing notice, revoked the pro hac vice status of the plaintiffs' Chicago counsel effective as of the date of the jury's verdict. The plaintiffs and their Chicago counsel filed another notice of appeal to challenge this action. That appeal is dealt with in our separate opinion filed today.

II.

We turn first to the district court's denial of the plaintiffs' motion to recuse. Even a brief examination of the factual and procedural history of this case reveals the tension existing between the parties and especially between the plaintiffs and the trial judge. Unfortunately, this tension was exacerbated both by the numerous delays in bringing the case to trial, the necessity for counsel to stand by for days in expectation of being called for trial, and the length of the trial.

The plaintiffs filed a motion pursuant to 28 U.S.C. §144, which requires the district judge to recuse himself if personal bias or prejudice against or in favor of any adverse party exists. The district court also raised, sua sponte, whether it should recuse itself pursuant to 28 U.S.C. §455(a), which requires recusal if the judge's "impartiality might be reasonably questioned." Although Congress has not indicated the precise parameters of the two provisions, we need not decide that here because both statutes require the same type of bias for recusal and it is not present in this case.

In this circuit, review by this court of a district court's action on recusal is by an abuse of discretion standard. *See Mayberry v. Maroney*, 558 F.2d 1159, 1162-63 (3d Cir. 1977). In general, it seems that §455(a) was intended only to change the standard the district judge is to apply to his or her conduct; it does not alter the type of bias required for recusal. Thus the rule under §144 continues that only extrajudicial bias requires disqualification. *See id.* at 1162 n.16. *See generally* H. Rep. No. 93-1453, *reprinted* in [1974] U.S. Code Cong. & Admin. News 6351, 6354-55.

"Extrajudicial bias" means two things. First, "extrajudicial" refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings. *See United States v. Grinnell Corp.*, 384 U.S. 563, 580-83 (1966).

Second, normally the judge's rulings at trial do not constitute grounds for recusal because they can be corrected by reversal on appeal. *See Smith v. Danyo*, 585 F.2d 83, 87 (3d Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028, 1039 (3d Cir. 1978), *cert. denied*, 100 S. Ct. 713 (1979).

We have examined the affidavits and other evidence pointed to by the plaintiffs and find no extrajudicial bias in this sense. The plaintiffs first point to certain scheduling and other rulings by the district court. As noted, however, these are not a basis for recusal.

Second, the plaintiffs argue that statements made by the district court during the settlement negotiations show extrajudicial bias. For example, the judge made statements at the final settlement conference to the effect that the lawsuit had been a "personal tragedy for the defendants" who were "honest men of high character." He also questioned the plaintiffs' motives in bringing the lawsuit and stated that plaintiff Gilbert Johnson was unable to reason logically from A to B. The plaintiffs' claim that these comments manifest extrajudicial bias is partially predicated on the timing of these statements — namely, at a pre-trial settlement conference before any evidence had been adduced which could serve as a basis for the formulation of an opinion on the trial judge's part.

In his opinion denying the motion to recuse, the judge explained that challenged comments did not constitute extrajudicial bias. He stated that his remarks at the settlement conference were based on his perception of the case and were an attempt to have the parties reach an agreeable settlement. Although admitting that many of the statements "may have been intemperate," he concluded that such statements were not sufficient to warrant recusal.

We do not believe that because some of the challenged statements were made at pretrial settlement conference that necessarily renders them extrajudicial. *See*

Fong v. American Airlines, Inc., 431 F.Supp. 1334, 1338-39 (N.D. Cal. 1977). Such a rule would unduly hamper the judge's ability to effectuate settlement. Moreover, the judge often can get a feel for a case prior to trial, which means that his perceptions can be based on the conduct of the parties and the evidence. Thus feelings about a case are not necessarily "extrajudicial" solely because they are made during settlement negotiations.

The relevant inquiry is whether the trial judge's pretrial comments were linked to his evaluation of the case based on the pleadings and other materials outlining the nature of the case, or whether the comments were based on purely personal feelings towards the parties and the case. It is undeniable that statements such as the case has been a "personal tragedy" for the defendants who are "fine men" of "honest character" may superficially connote an extrajudicial source of information or, as we are inclined to believe, it may have been a form of judicial coloration in an overzealous effort to settle what obviously would be a lengthy and complicated case to try. We agree with the judge's candid concession that many of his statements may have been "intemperate." Indeed, this experience points out the restraints and objectivity a judge must maintain in an effort to achieve a settlement and the need to refrain from comments which might lead one party to conclude that a personal bias may exist against him.

We have carefully reviewed the plaintiffs' recusal affidavit and although the allegations are indeed troublesome, we believe on balance that they add up more to settlement fever than personal bias warranting recusal under either §144 or §455(a). Thus we cannot say that the district court abused its discretion in this case. Nevertheless, we take this opportunity to caution the district judges of this circuit that they must not permit their role as a negotiator to obscure their paramount duty to ad-

minister the law in a manner that is both fair in fact and has the appearance of fairness. Although settlement is important given the rising caseload, it can lead to action that is not consistent with the judicial function.

III.

Next, the plaintiffs argue that the district court improperly charged the jury on their burden in overcoming the business judgment rule. That rule, which admittedly is part of the law of Delaware, provides that directors of a corporation are presumed to exercise their business judgment in the best interest of the corporation. The charge was as follows:

> [T]he desire to retain control of a corporation in and of itself is an improper motive for decision of a director. Therefore, if you find by a preponderance of the evidence that the defendants acted solely or primarily because of a desire to retain control of Penn Eastern, then the presumption of the sound business judgment rule has been rebutted. However, I further instruct you that a director may properly decline to adopt a course of action which would result in a shift of control, so long as his actions can be attributed to a rational business purpose. In other words, so long as other rational business reasons support a director's decision, the mere fact that a business decision involves a retention of control does not constitute a showing of bad faith to rebut the business judgment rule. *That rule is rebutted only where a director's sole or primary purpose for adopting a course of action or refusing to adopt another is to retain control.* (emphasis supplied)

Instead of the emphasized language, the plaintiffs argue that they only needed to prove that control was "a" motive in the defendants various actions to rebut the business judgment rule. We disagree for two reasons.

First, the purpose of the business judgment rule belies the plaintiffs' contention. It is frequently said that directors are fiduciaries. Although this statement is true in some senses, it is also obvious that if directors were held to the same standard as ordinary fiduciaries the corporation could not conduct business. For example, an ordinary fiduciary may not have the slightest conflict of interest in any transaction he undertakes on behalf of the trust. Yet by the very nature of corporate life a director has a certain amount of self-interest in everything he does. The very fact that the director wants to enhance corporate profits is in part attributable to his desire to keep shareholders satisfied so that they will not oust him.

The business judgment rule seeks to alleviate this problem by validating certain situations that otherwise would involve a conflict of interest for the ordinary fiduciary. The rule achieves this purpose by postulating that if actions are arguably taken for the benefit of the corporation, then the directors are presumed to have been exercising their sound business judgment rather than responding to any personal motivations.

Faced with the presumption raised by the rule, the question is what sort of showing the plaintiff must make to survive a motion for directed verdict. Because the rule presumes that business judgment was exercised, the plaintiff must make a showing from which a factfinder might infer that impermissible motives predominated in the making of the decision in question.

The plaintiffs' theory that "a" motive to control is sufficient to rebut the rule is inconsistent with this purpose. Because the rule is designed to validate certain transactions despite conflicts of interest, the plaintiffs' rule would negate that purpose, at least in many cases. As already noted, control is always arguably "a" motive in any action taken by a director. Hence plaintiffs could always make this showing and thereby undercut the purpose of the rule.

Second, the plaintiffs' argument is inconsistent with Delaware case law. Although scholars have argued about how much is required under Delaware law to rebut the business judgment rule, we need not resolve that debate. *See* E. Folk, The Delaware General Corporation Law 75-81 (1972); Arsht, *Fiduciary Responsibilities of Directors, Officers and Key Employees*,[4] 4 Del. J. Corp. L. 652, 660 (1979). At a minimum, the Delaware cases require that the plaintiff must show some sort of bad faith on the part of the defendant. *See* Arsht, *supra*. We do not think that a showing of "a" motive to retain control, without more, constitutes bad faith in this context unless we are to ignore the realities of corporate life. Accordingly, unless the plaintiff can tender evidence from which a factfinder might conclude that the defendant's sole or primary motive was to retain control, the presumption of the rule remains.

The primary source of the "sole or primary motive" test used in the charge here is *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964). Although the case explicitly contains this language, see 199 A.2d at 554, the plaintiffs would dismiss *Cheff* as a momentary aberration in the law of Delaware. An examination of the relevant cases, however, reveals that the test was used both before and after *Cheff* by the Delaware courts.

For example, *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405 (1962), relied on by *Cheff*, expressly characterized the defendant's actions as a 'thinly veiled attempt" to retain control. 187 A.2d at 409. Indeed, a reading of the opinion as a whole reveals that the court felt that there was no reason other than control for the actions in question. We do not see how *Bennett's* failure to use the talismanic phrase "sole or primary motive" in any way renders it inconsistent with *Cheff*.

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4. We are advised that the correct title is:

The Business Judgment Rule in Delaware and Its Applicability To The Fiduciary Responsibilities of Directors, Officers and Controlling Stockholders.

Cases after *Cheff* have shown no inclination to abandon the sole or primary motive test. In *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769 (1967), one of the cases relied on for this proposition, the vice chancellor made this express finding: "I have reached the conclusion that the *primary purpose* of the [actions in question] was to prevent control of Lunkenheimer from passing to Condec and to cause such control to pass into the hands of U.S. Industries." 230 A.2d at 775 (emphasis supplied). Other more recent cases have similarly spoken of "primary" motive in this regard. *E.g., Petty v. Pentech Papers, Inc.*, 347 A.2d 140, 143 (Del. Ch. 1975). *Cf. Singer v. Magnavox Co.*, 380 A.2d 969, 980 (Del. 1977) (stating that use of merger "solely" to eliminate minority violates majority's fiduciary duty).

In short, we believe that under Delaware law, at a minimum the plaintiff must make a showing that the sole or primary motive of the defendant was to retain control. If he makes a showing sufficient to survive a directed verdict, the burden then shifts to the defendant to show that the transaction in question had a valid corporate business purpose. Because the charge fairly contains such a standard, we find no error.

IV.

A.

The plaintiffs also raise as error the district court's refusal to permit them to amend their complaint on two occasions. The first of these concerned the loss through foreclosure in August 1978 of the shopping center that was Penn Eastern's major asset by virtue of its general partnership interest in The Village Center, Ltd. The motion to amend was originally submitted on September 18, 1978, one day before trial was to commence. The trial judge denied the motion to amend as to liability because it might unduly delay the liability phase of the tri-

al, but permitted the amendment as to damages. When a mistrial of the liability portion of the trial was declared, and the case reset for a February 20, 1979 trial, plaintiffs retendered their amendment as to liability for the loss of the shopping center. No action was taken until February 7, 1979, when the retendered amendment was again rejected by the court because of "the severe prejudice that would result to the defendants if the amendment were allowed, as compared with the lack of prejudice to the plaintiffs caused by disallowance, since they may of course proceed to file the claims in a separate cause of action" and because of the "possibility that an amendment would delay the trial." The Johnsons contend that the trial judge erred in rejecting their proposed amendment.

We need not decide whether the factors cited by the district court were sufficient to deny the amendment because in any event the foreclosure would not have been admissible under Delaware substantive law in the liability phase of the trial. Thus any error in denying the amendment was harmless under Fed. R. Civ. P. 61.[5]

The governing rule of Delaware law in this regard is: "[D]irectors satisfy their burden by showing good faith and reasonable investigation; the directors will not be penalized for an honest mistake of judgment, *if the judgment appeared reasonable at the time the decision was made*." *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548, 555 (1964) (emphasis supplied). The purpose of this rule is to protect corporate management from being judged by hindsight if a deal in fact goes sour. The sole question is management's state of mind at the time of

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5. At least one commentator has noted that courts are split on whether the merits of an amendment are proper matters to be considered by a district court under rule 15(a). *See* 3 Moore's Federal Practice ¶15.08[4], at 15-105. We are not presented with that question, however, because the district court did not address this question. On appeal, however, we are required to address the merits because we may only reverse for errors that satisfy rule 61.

the transaction. No matter how other facets of the business judgment rule operate, we have found nothing to indicate that this principle does not remain good law in Delaware.

Although in some cases events subsequent to a transaction might shed light on management's motives at the time of the transaction, such is not the case here. The plaintiff's have pointed to nothing that would indicate that the mere fact that the shopping center was foreclosed in 1978 shows anything about the defendants' pre-1975 motives, and we can conceive of no reason why it would. Because Delaware will not look at subsequent events unless they shed light on motive at the time of the transaction, any error was harmless.

B.

The plaintiffs also attempted to amend the pleadings on the forty-third day of the trial to allege negligence on the part of the defendants in their performance of their duties as directors of Penn Eastern. This motion was made pursuant to Fed.R.Civ.P. 15(b), which permits the court to amend the pleadings to conform to the evidence of the trial. The district court denied the motion on the grounds of prejudice to the defendants because the allegation of negligence would shift the theory of the trial and force the defendants to prepare a mid-trial defense on a new issue.

Even assuming that negligence of directors states a cause of action under Delaware law, we cannot say it was an abuse of discretion under rule 15(b) to deny the motion. It is true that mere delay, in and of itself, is not grounds for denial of a motion to amend under rule 15(b). Nevertheless, when the delay combines with other extrinsic factors that result in actual prejudice to the party opposing the motion, denial is appropriate. *Cf. Deakyne v. Commissioners of Lewes*, 416 F.2d 290,

299-301 & n.19 (3d Cir. 1969) (amendment should have been permitted because no prejudice other than delay).

Here, as our recitation of the facts shows, the trial of the case had been protracted. Yet the plaintiffs have not explained why they failed to assert their negligence theory sooner. Indeed, the amendment was based primarily on a deposition that the plaintiffs sought to introduce in their own case in chief that had been taken quite some time prior to trial. Moreover, the plaintiffs were asserting a new theory that arguably would have prejudiced the defendants due to the fact that the events upon which the claims were made were rather stale by the time of the proposed amendment. Accordingly, we cannot say that the district court abused its discretion.

V.

We have examined the remainder of the plaintiffs' contentions and find no reversible error. The judgment will be affirmed.

ROSENN, *Circuit Judge*, Concurring and Dissenting.

I join and concur in parts I and II of the majority opinion. I believe, however, that the district court committed reversible error and I therefore dissent from the remainder of the opinion, parts III through V.

I.

This case presents several troublesome issues for our consideration but at the forefront are two questions concerning the district court's management of the trial. Even a cursory glance at the factual and procedural history of this case reveals the tension existing between the parties and especially between the plaintiffs and the trial

judge. Unfortunately, this tension was exacerbated both by the numerous delays in bringing the case to trial, the necessity for counsel to stand by for days in expectation of being called for trial, and the length of the trial. Plaintiffs raise numerous arguments on appeal dealing with legal and evidentiary rulings made at trial, but first argue that the district court erred in denying two pre-trial motions: (1) the motion to amend the pleadings pursuant to Fed.R.Civ.P. 15; and (2) the motion to recuse under 28 U.S.C. §144. As I have already noted, I concur in the majority's disposition of the motion to recuse and I will not again allude to this thorny issue. However, I believe the district court's disposition of the motion to amend the pleadings constituted reversible error.

Before I discuss the motion to amend, it may provide some perspective to recount the tortuous history of advancing the case to trial, especially because the denial of the motion to amend as to liablity was on the ground that it might delay the trial. This case, initially set for trial on May 4, 1977, was called and a jury selected. The trial judge granted a mistrial because defendant's counsel, though previously on notice by a motion of the plaintiffs of the possible impropriety of such conduct, injected prejudicial and improper remarks in their opening arguments to the jury. Although the plaintiffs moved for and all parties urged the prompt calling of a new jury, the district court did not rule on the request but sometime later set November 30, 1977, as the trial date. The court subsequently vacated this date and several others that were thereafter set and ultimately set August 21, 1978. The parties appeared on that date but the trial judge declined to begin the trial and renewed his extensive efforts to have the parties reach a settlement.

After it became apparent that a settlement could not be achieved, the trial judge reset the trial date for September 6, 1978. Meanwhile, the multi-million dollar shopping center owned by The Village Center, Ltd., was

scheduled for a foreclosure sale on August 23, 1978. The foreclosure took place as advertised. The Johnsons had given notice on August 21 that should the shopping center be lost, they would seek amendment of their complaint to include its loss as both grounds for liability and damages. The court had advised plaintiffs' counsel that they would be permitted to amend their pleadings orally during trial.

The parties returned to court for trial on September 6, 1978. The court did not commence trial on the day fixed and instructed the parties and counsel to be available on twenty-four hours' notice, although principal counsel representing the Johnsons maintained his law offices in Chicago, Illinois, and was not permitted to return meanwhile. On September 18, 1978, the Johnsons tendered their proposed amendment to the complaint relating to the loss of the shopping center. This amendment was allowed only on the issue of damages but denied as to liability on the ground that such an allowance might delay the liability phase of the trial. On September 19, 1978, trial finally got underway, but because of numerous interruptions, many at the instance of the court, the trial judge aborted the trial once again. Trial was now fixed for February 20, 1979. The Johnsons once more tendered their proposed amendment to the complaint as to liability but the trial judge held it without disposition for the next three months. On February 7, 1979, the trial judge again rejected the proposed amendment to the complaint on the ground that it might delay the trial.

A. *The Post-1975 Claims*

Plaintiffs made two motions to amend the pleadings to add additional claims against the defendants. The first of these concerned the loss through foreclosure in August 1978 of the shopping center which was Penn Eastern's major asset by virtue of its general partnership

interest in The Village Center, Ltd. As already adverted to, the written motion to amend was originally submitted on September 18, 1978, one day before trial was to commence. The trial judge denied the motion to amend as to liability because it might unduly delay the liability phase of the trial, but permitted the amendment as to damages. When a mistrial of the liability portion of the trial was declared on September 29, 1978, and the case reset for a February 20, 1979 trial, plaintiffs promptly retendered their amendment as to liability for the loss of the shopping center. The court took no action until February 7, 1979, when the retendered amendment was again rejected by the court because of "the severe prejudice that would result to the defendants if the amendment were allowed, as compared with the lack of prejudice to the plaintiffs caused by disallowance, since they may of course proceed to file the claims in a separate cause of action" and because of the "possibility that an amendment would delay the trial. . . ." The Johnsons contend that the trial judge erred in rejecting their proposed amendment. I agree.

The governing rule on amendment of the pleadings is Fed.R.Civ.P. 15(a)[1] which provides in relevant part:

> A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be granted when justice so requires. . . .

The Johnsons had already amended their complaint as a matter of course to include claims against Harry Salwen as a Penn Eastern director. The grant of their motion to

1. Plaintiffs argue in this court that Fed.R.Civ.P. 15(b) applies. That rule allows a court to amend the pleadings to conform to the evidence. Inasmuch as the instant amendment was made before trial, the applicable rule is Fed.R.Civ.P. 15(a) which governs amendments to the pleadings in general.

amend the pleadings to include the loss of the shopping center therefore rested within the discretion of the court. Indeed, the Johnsons admit that they must show an abuse of discretion on the part of the district court. *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Cornell & Co. v. OSHRC*, 573 F.2d 820, 823 (3d Cir. 1978); 3 Moore's Federal Practice, ¶15.08(4) (2d ed. 1979).

Rule 15(a) itself provides that amendments should be "freely given when justice so requires." The courts have taken a liberal approach to permitting amendments under Rule 15(a). In *Forman v. Davis, supra*, 371 U.S. at 182 the Court held:

> If the underlying facts or circumstances relied upon by the plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given."

Accord, Cornell & Co., supra; Goodman v. Mead & Johnson Co., 534 F.2d 566 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

Two grounds were asserted by the district court for the denial of plaintiffs' motion to amend: (1) severe prejudice to the defendants, and (2) the possibility of trial delay. I find neither of these possibilities sufficiently significant to warrant denial of the motion to amend.

I consider first the possibility of prejudice to the defendants because "[i]t is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co., supra*, 573 F.2d at 823. The exact nature and degree of prejudice necessary for

denial of an amendment is not readily susceptible to a precise formula, but I believe that the defendants must show that the amendment would adversely affect their ability to defend adequately the case. *Cf. Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969) (prejudice under Rule 15(b) means difficulty in prosecuting a lawsuit as a result of tactical or theoretical change by other party). Otherwise, both the interests of judicial economy and justice might be frustrated by denial of the amendment and resultant second trial. Professor Moore writes that

> [r]ecognizing that the entire spirit of the [federal] rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where . . . the opposing party will not be unduly prejudiced. . . .

3 Moore's, *supra*, ¶15.08[2] at 15-61-62 (footnotes omitted).

The defendants marshal little evidence that the proposed amendment by the plaintiffs would have prejudiced them. The proximity of the original proposed amendment to the trial date in September 1978 conceivably could have made it difficult for the defendants to prepare adequately to counter a claim of corporate mismanagement in the loss of the shopping center. However, as plaintiffs point out, the only witnesses relevant to the issue of the extent of the shopping center's loss were under the defendant's control.

We need not be concerned with the issue of whether acceptance of the proposed amendment in September 1978 would have prejudiced defendants in the preparation of their case, for assuming such prejudice existed, it disappeared after the declaration of the September mistrial and subsequent retendering of the amendment more than three months prior to the rescheduled trial date in February 1979. Had the district court acted

promptly and granted the motion to amend, the defendants certainly would have had ample time to prepare a defense to any claim arising out of the shopping center's loss. If there were prejudice to the defendants, which we fail to perceive, it was due solely to the failure of the court to act on plaintiffs' timely filed motion to amend. Indeed, since the foreclosure occurred in August 1978, it is difficult to see how plaintiffs could have tendered their proposed amendment much earlier. I hardly think it befits the spirit of Rule 15(a) for the court to attribute prejudice from a proposed amendment of the pleadings to the plaintiffs, when the root of the inconvenience to the defendants, if any, is the court's inaction. I perceive no prejudice to the defendants chargeable to the plaintiffs which warrants rejection of their proposed amendment to the pleadings.[2]

The district court, both in its September 1978 and February 1979 denial of plaintiffs' motion to amend, cited adverse delay in the liability phase of the trial as a basis for rejection of the amendment. But this court has specifically indicated that "[d]elay alone, however, is an insufficient ground to deny an amendment, unless the delay unduly prejudices the non-moving party." *Cornell & Co., supra*, 573 F.2d at 823. *See also Deakyne, supra*, 416 F.2d at 300 n.19. Although possible interruption of the trial in September to permit discovery on the proposed new claim might have been a sufficient threat of prejudicial delay to warrant rejection of the amendment when first offered, the mistrial and three-month delay in retrial obviated any prejudice to defendants when the

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2. The district court opined and the defendants contend that the plaintiffs could have brought their claims arising out of the loss of the shopping center in a separate action. In the absence of specific demonstrable prejudice to the defendants, alternatives open to the plaintiffs are simply not relevant. In any event, both the possibility of collateral estoppel effect on the second trial, the interests of judicial economy and additional expenses of litigation weighed in favor of accepting the proposed amendment.

amendment was retendered. The delay that followed in the disposition of that amendment was not due in the slightest to the plaintiffs' lack of diligence or good faith. I therefore believe that the district court erred in denying plaintiffs' retendered motion to amend under Rule 15(a) to include the post-1975 claim arising out of the foreclosure of the shopping center.

The defendants argue, however, that even if the district court erred in rejecting the amendment, plaintiffs are entitled to a new trial only on the post-1975 claims arising out of the foreclosure because this event was severable from the other claims of fraud and breach of fiduciary duty.[3] Defendants argue that the presentation of evidence on the post-1975 claims would have had no impact on the jury's consideration of the pre-1975 claims in the complaint. I find this argument untenable.

The pre-1975 claims all involved charges of either fraud, mismanagement or breach of fiduciary duty on the part of the defendants in their handling of Penn Eastern's financial affairs. Central to plaintiffs' charges was their belief that at the time the defendants acted, they were not motivated by the best interests of Penn Eastern. The basis of the plaintiffs' complaint was that the loans and sale of stock and other assets by the defendants to meet the financial difficulties of The Village Center, Ltd., were motivated not by the corporation's best interests but rather by the defendants' personal motives to maintain corporate control. Conversely, the defendants' major defense was one of "unclean hands" in that plaintiffs' motives were similarly the control of Penn Eastern. I believe the loss of Penn Eastern's major asset, the shopping center, certainly was germane in confirming plaintiffs' theory that the defendants were not acting in the best interests of Penn Eastern in managing its financial affairs and were breaching *their fiduciary du-*

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3. This assumes that no reversible error was committed with respect to the pre-1975 claims, an issue which I consider in *infra* II.

ties to the corporation and its shareholders. The jury, without knowledge of the loss of the shopping center, may have been more willing to accept the defendants' version of their exercise of discretion in the management of Penn Eastern's affairs. With knowledge of the loss of the shopping center and of plaintiffs' admonition to the defendants of the need to act to forestall the impending foreclosures, the jury might well have found plaintiffs' complaint meritorious. With the complaint amended and the shopping center sold at sheriff's sale, the jury could well have concluded that the decisions made by the defendants were not in Penn Eastern's best interests, and were not honest mistakes of judgment, but were dictated solely by personal motives of corporate control.

In sum, the issues would have been drawn more sharply, the basis of plaintiffs' charges concretized, and the jury might have rendered its verdict for the plaintiffs. Simply put, without the inclusion of the loss of the shopping center, the jury would not have had the full picture of Penn Eastern's corporate disintegration for the attempts to restore financial health to Penn Eastern by the Pierce loan and sale of stock to Arnold Trueblood might have been viewed by the jury as apparently little more than cosmetic stop-gaps. I therefore cannot agree with the majority that the failure to allow the amendment amounted only to harmless error. I believe that the district court's erroneous denial of the amendment to include post-1975 claims taints the entire trial and that a new trial on all issues is necessary.[4]

B. *The Negligence Claims*

The plaintiffs also attempted to amend the pleadings on the forty-third day of the trial to allege negli-

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4. Although the trial of this case was unnecessarily prolonged, a new trial can be expedited and condensed.

gence on the part of the defendants in their performance of their duties as directors of Penn Eastern. This motion was made pursuant to Fed.R.Civ.P. 15(b) which permits the court to amend the pleadings to conform to the evidence of the trial.[5] The district court denied the motion on the grounds of prejudice to the defendants because the allegations of negligence would shift the theory of the trial and force the defendants to prepare a mid-trial defense on a new issue.

I will not deal with the correctness of the court's ruling on this motion because my conclusion that a new trial is required moots the issue whether the court properly denied the negligence amendment. On retrial the plaintiffs should be permitted to tender an amendment to the pleadings alleging the negligence claim, which the court in its discretion under Fed.R.Civ.P. 15(a) may accept. Given the necessity of preparing for a retrial of this case, I perceive little prejudice to the defendants in additionally preparing a defense to a negligence claim, and, unless other prejudice is evident, the court should be liberal in granting the motion to amend.

II.

A major issue in this case is whether the defendants acted in good faith in managing Penn Eastern's affairs or whether they acted for an improper purpose — namely, the desire to retain control over Penn Eastern when it was not in its best interest. If the defendants acted in good faith, the business judgment rule would insulate them from any losses as a result of their decisions.

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5. Fed.R.Civ.P. 15(b) provides in relevant part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise those issues may be made upon motion of any party at any time, even after judgment; . . . ."

The court instructed the jury as follows:

> [T]he desire to retain control of a corporation in and of itself is an improper motive for decision of a director. Therefore, if you find by a preponderance of the evidence that the defendants acted solely or primarily because of a desire to retain control of Penn Eastern, then the presumption of the sound business judgment rule has been rebutted. However. I further instruct you that a director may properly decline to adopt a course of action which would result in a shift of control, so long as his actions can be attributed to a rational business purpose. In other words, so long as other rational business reasons support a director's decision, the mere fact that a business decision involves the retention of control does not constitute a showing of bad faith to rebut the business judgment rule. *That rule is rebutted only where a director's sole or primary purpose for adopting a course of action or refusing to adopt another is to retain control.* (Emphasis added.)

The plaintiffs complain that the last sentence of the instruction incorrectly sets forth their burden of proof under Delaware law. They claim that to rebut the business judgment rule, they need not demonstrate that the defendants' "sole or primary" motive was the desire to retain control; only that control was a motive. I am persuaded that an examination of the relevant case law supports the plaintiffs' view that the district court's instruction was erroneous. I do not agree with the majority that plaintiffs' theory is inconsistent with Delaware case law.

I start with the case of *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405 (1962), in which the plaintiffs-shareholders challenged the purchase of a large quantity of the corporation's stock on behalf of the corporation by its principal executive, allegedly to dissipate a take-over

bid and to retain control over the corporation. The Supreme Court of Delaware invalidated the purchase, noting "the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate control. . . ." Because the court recognized the corporate dangers when directors are confronted with a conflict of interest and the subtleties involved in their decisions under such circumstances, it imposed the burden on the directors of vindicating the transaction, stating: "The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult. . . . Hence, in our opinion, the *burden should be on the directors* to justify such a purchase as one *primarily in the corporate interest*." *Id.* (Emphasis added.)

I read *Bennett* as holding that when a transaction involving control of a corporation raises a conflict of interest on the part of the board of directors, the burden is then thrust upon the defendants to go forward with proof establishing the fairness of the transaction. In other words, the business judgment presumption is dissipated once the plaintiffs show that an improper purpose — control — was a motive. This result is fully consistent with the purpose of the business judgment rule which is to insulate routine matters of corporate expertise from judicial scrutiny:

> The theoretical justification for the business judgment rule is that courts should be reluctant to review the acts of directors in situations where the directors' expertise is likely to be greater than the court's; thus the rule may be viewed as a guide for judicial restraint. A strong implication follows that the courts should not apply the rule where the decisions of directors are influenced by forces tending to create conflicts of interest. In such contexts, there is a great danger that the directors will channel their expertise toward pursuit of personal advantage.

R. Gelfond and S. Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U. L. Rev. 403, 435 (May 1980) (footnotes omitted).

Placing the burden of justifying the fairness of the transaction on the defendants, once control is implicated as a motive, appears to be confirmed in the case of *Cheff v. Mathes, supra*, which cites with approval the dispositive holding of *Bennett* concerning the burden of going forward with proof. *See* 199 A.2d at 554. The court in *Cheff*, however, citing *Bennett*, appears to have introduced an element of ambiguity when it stated: "[I]f the board has acted solely or primarily because of the desire to perpetuate themselves in office, the use of corporate funds for such purposes is improper." It is the court's mention of "sole" or "primary" purpose in *Cheff* which produced the problem in the instant case. This statement made in the court's discussion of *liability*, not the burden of proof, nonetheless cites *Bennett v. Propp, supra*. The district court and the majority read this language as placing an initial burden of proof on the plaintiffs to overcome the business judgment presumption. However, when it reached the question of the burden of proof to show the present or lack of good faith on the part of the Board of Directors, the *Cheff* court fully and unequivocally reiterated the burden of proof rule it announced in *Bennett*, again stating that the burden is on the directors to justify the transaction "as one primarily in the corporate interest." *Cheff v. Mathes, supra* 199 A.2d at 554. Nothing in *Bennett* or *Cheff* suggests that the plaintiff must first prove that the sole or primary purpose of the transaction was the directors' desire to retain control over the corporation.[6] Rather, the unequivocal

6. Indeed, I believe such a test would be exceedingly difficult to apply. For example, if the plaintiff could show that control dominated the corporate decision by 50% or more, would the business judgment presumption disappear; but if he shows only 49% control motive, the presumption remains? Further, we believe it would be difficult to determine exactly what subjective motive was involved

thrust of *Bennett* is that once the record demonstrates that control is implicated in the transaction, a conflict of interest is *ipso facto* created. Once a conflict of interest is present, the burden of proof is shifted logically and pragmatically on the defendants "to justify the transaction as one primarily in the corporate interest." *Bennett, supra*, 187 A.2d at 409. Indeed, the "primary purpose" language of *Cheff* appears to be directed towards the defendant's burden in justifying the transaction, i.e., that the sole or primry purpose was not control.

The sole or primary purp e language of *Cheff* was not utilized in *Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769, 776 (1967), where the court stated:

> Where, however, the objection sought in the issuance of stock is not merely the pursual of a business purpose but also to retain control, it has been held to be a mockery to suggest that the "control" effect of an agreement in litigation is merely incidental to its primary busness objective.

This language supports *Bennett's* rule that the issue of control as a motive is so central to the issue of business judgment that the burden is on the defendant to justify the soundness of the transaction as one primarily in the corporate interest.[7] Recent Delaware cases reveal a growing trend to impose stricter obligations on manage-

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since any decision may involve a multitude of considerations. Also, under the majority's reading of *Cheff*, it is unclear whose motive or purpose is involved: is it the entire board of directors, one director, or a majority of the board?

7. Although the court in *Condec* found that control was the primary purpose of the transaction, *see* 230 A.2d at 775, nothing in the opinion suggests that plaintiffs must first prove control to be the sole or primary purpose before the business judgment presumption disappears. Indeed, the court in *Condec* refrained from placing the full burden on the defendants to justify the transaction because it was not established that the board of directors was acting in their own self-interest. *See id.* at 776-77.

ment to justify control-related transactions. *Cf. Singer v. Magnavox*, 380 A.2d 969 (Del. 1977) (freeze-out merger by majority shareholders subject to fairness test); *Sinclair Oil by Levien*, 280 A.2d 717, 720 (Del. 1971) (intrinsic fairness test and not business judgment rule applies where parent corporation receives benefit to the exclusion and detriment of subsidiary); *Petty v. Penntech Papers, Inc.*, 347 A.2d 140, 143 (Del. ch. 1975) (A purchase of shares with corporate funds to remove a threat to management policy and control casts the burden on defendant directors to justify the purchase as "one primarily in the corporate interest and not their ").

Therefore, I believe that a standard requiring plaintiffs to show that control was the sole or primary purpose motivating the defendants' conduct imposes a burden on the plaintiffs not consistent with Delaware law. Unlike the majority, I believe that under Delaware law, once plaintiff has shown that the desire to retain control was a motive in the particular business decision under challenge, the burden is then on the defendant to move forward with evidence justifying the transaction as primarily in the corporation's best interest. Accordingly, I believe the district court erred in its charge to the jury and that the case should be remanded for new trial.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 76-1002)

ORDER AMENDING SLIP OPINION

The concurring and dissenting opinion in the Slip Opinion in the above filed July 31, 1980, be and is hereby amended as follows:

Page 25, Line 13, delete "on retrial the plaintiffs should be permitted to tender an amendment to the pleadings alleging the negligence claim, which the court in its discretion under Fed.R.Civ.P. 15(a) may accept."

Page 25, Line 17, amend to read: "Given the necessity of preparing for a retrial of this case under my analysis,".

By The Court:
/s/ MAX ROSENN
Circuit Judge

August 19, 1980

UNITED STATED COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2525

JOHNSON, GILBERT P. and JOHNSON, HERVEY M.

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, individually and derivatively on behalf of Penn Eastern Development Corporation, plaintiffs above named and their counsel *pro hac vice* below, Myron M. Cherry,
*Appellants**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 76-1002)

Argued March 18, 1980

Before: SEITZ, *Chief Judge*, and
ROSENN and HIGGINBOTHAM, *Circuit Judges*

(Filed July 31, 1980)

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*Technically, there was no entrance of an appearance of counsel for the Johnson appellants in this case. Nevertheless, there was an appearance entered for these appellants in No. 79-1892, and the court believes that the failure to mention this appeal in that document was a mere inadvertance.

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Roslyn G. Pollack
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Counsel for Harvey I. Salwen

OPINION OF THE COURT

PER CURIAM:

The plaintiffs, Hervey and Gilbert Johnson, and their Chicago attorney, Myron M. Cherry, appeal an order of the district court revoking Cherry's pro hac vice status. The facts of the underlying suit between the plaintiffs and the various defendants are set out in our opinion in the separate appeal in No. 79-1892. *See Johnson v. Trueblood,* —— F.2d —— (3d Cir. 1980). On July 3, 1979, the jury gave a verdict for the defendants. On July 6, the notice of appeal was filed in No. 79-1892. On July 19, without any prior notice or a hearing, the district court sua sponte revoked Cherry's pro hac vice status

retroactively to the date of the verdict.[1] The revocation was based on the attorney's conduct during the trial.

I.

We initially consider our jurisdiction to hear the appeal by an attorney and his clients of an order revoking the attorney's pro hac vice status. As to the attorney, we conclude that the revocation order is appealable as a final order under 28 U.S.C. §1291. In general, an order is final for purposes of §1291 if it leaves nothing more for the court to do but execute the judgment. *E.g., Catlin v. United States*, 324 U.S. 229, 233 (1945). The revocation order certainly is final in that sense.

An additional problem is whether an attorney, although technically not a party of record, may avail himself of §1291 to appeal such an order. We conclude that he can. The attorney is subject to the district court's disciplinary powers, and this order directly binds him by revoking his permission to practice before the district court in this case. In a somewhat analogous context, we have held that an attorney may appeal a contempt order against him pursuant to §1291. *See Commonwealth v. Local Union 542, International Union of Operating Engineers*, 552 F.2d 498, 501 n.6 (3d Cir.), *cert. denied*, 434 U.S. 822 (1977). Because the attorney is a party to the order in the most elementary sense, this case is dis-

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1. We note that the facts of this case are somewhat unusual in that the revocation order was not entered until after the notice of appeal was filed. Thus we are not presented with the question of what sort of procedures are appropriate for disciplining pro hac vice attorneys during the course of trial.

In addition, the fact that we have affirmed the judgment for the defendants in No. 79-1892 does not necessarily mean that there will be no further proceedings in the district court in which plaintiffs' counsel can participate. The defendants have filed a motion for costs and attorneys' fees, and the district court has entered an order staying its disposition of the motion pending the appeal.

tinguishable from the situation where the appellant is not directly bound by the order and never intervenes in the district court as a party. *See, e.g., Hoots v. Commonwealth*, 495 F.2d 1095 (3d Cir.) (per curiam), *cert. denied*, 419 U.S. 884 (1974).

As to the clients, they seek to assert only their attorney's rights. Although normally a person may not assert the rights of others, one exception is where the interest of the two sets of people are inherently interrelated. *E.g., Carey v. Population Services International*, 431 U.S. 678, 683-84 (1977).

Here, the clients' interests are undeniably affected in that the order deprives them of the attorney of their choice. Indeed, in *Leis v. Flynt*, 439 U.S. 438 (1979) (per curiam), the Supreme Court permitted, without comment, both a client and his attorneys to raise the rights of the attorneys relating to denial of pro hac vice status. *Cf. IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978) (client appealing disqualification on ethical grounds).

Accordingly, we conclude that we have jurisdiction to hear the appeal of both the clients and their attorney.

II.

The crucial question in this case involves what procedures should be used where a district court seeks to revoke an attorney's pro hac vice status. As we have noted in the past, we have inherent supervisory power over the district courts to regulate certain procedural matters of significance. *E.g., United States v. Schiavo*, 504 F.2d 1, & n.7 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 1096 (1974). Here, we believe that some type of notice and an opportunity to respond are necessary when a district court seeks to revoke an attorney's pro hac vice status.

Such procedures are desirable for two reasons. First, although at one time pro hac vice status was con-

sidered to be granted and held at the grace of the court, we believe that in this era of interstate practice of law, such a notion cannot be applied too literally or strictly. Second, some sort of procedural requirement serves a number of salutary purposes. It ensures that the attorney's reputation and livelihood are not unnecessarily damaged, protects the client's interest, and promotes more of an appearance of regularity in the court's processes.

As to the type of notice required, flexibility is dictated because in some cases there may be circumstances where formal notice is inappropriate. We therefore leave the form of the notice to the discretion of the district court with the limitation that it adequately inform the attorney of the basis upon which revocation is sought. In short, the attorney should be notified of two things: the conduct of the attorney that is the subject of the inquiry, and the specific reason this conduct may justify revocation.

Obviously this concept of notice requires that the attorney somehow receive notice of the standard that will be applied to his conduct. Here the district court based its revocation order entirely on what it perceived to be violations of the Code of Professional Responsibility. Local Rule 14 of the Eastern District of Pennsylvania makes the Code an applicable standard of professional conduct for members of its bar. At a minimum, a violation of any disciplinary standard applicable to members of the bar of the court would justify revocation of pro hac vice status. We leave open the question whether different cases require different standards.

As to the opportunity to respond, there is the question of whether a full scale hearing is appropriate in every case. We believe that it is not. With an attorney who is a member of the bar of the court, disciplinary matters can be referred to the appropriate disciplinary committee. With a pro hac vice attorney, such a course is obvi-

ously not possible. Moreover, because the attorney who is a member of the bar of the court has a continuing relationship with the court, there is more time to take action in disciplinary matters. By contrast, the pro hac vice attorney's status as a member of the court is limited in time to one case, which places certain time constraints on the court.

Therefore, we conclude that a full scale hearing is not required in every case. All that we will mandate is that the attorney be given a meaningful opportunity to respond to identified charges. Of course in certain cases a full hearing might be desirable, but we leave that to the discretion of the district court. We also note that the district court must give written reasons for any revocation. We know the district courts will be mindful of the fact that at least where violations of the Code of Professional Responsibility are involved, any decision could have repercussions in the attorney's "home" state, a fact to be considered in the district court's exercise of its discretion.

Finally, the appellants argue that revocation proceedings must be held before a different judge than the trial judge. We need not decide, however, whether this is true in every case. Given the circumstances of this case and the tension more fully described in No. 79-1892, we conclude that, if the matter of revocation is pursued further, *see* note 1 *supra*, it should be assigned to another judge.

III.

The appellants contend that they have a right to a full hearing under the due process clause of the fifth amendment to the Constitution. We realize that it is possible that the procedures we have required under our supervisory power might not fully accord the appellants all they seek. Nevertheless, we feel it is inappropriate to address this difficult question at this stage of the proceed-

ing. Even if this matter is pursued in the district court, the new judge may mandate procedures that satisfy the appellants. If not, we feel it is better for the district court in the first instance to consider appellants' contentions about the inadequacy of the procedures.

IV.

The order of the district court will be vacated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2525

JOHNSON, GILBERT P. and JOHNSON, HERVEY M.

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, individually and derivatively on behalf of Penn Eastern Development Corporation, plaintiffs above named and their counsel *pro hac vice* below, Myron M. Cherry,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 76-1002)

Present: SEITZ, *Chief Judge*, ROSENN and HIGGINBOTHAM, *Circuit Judges*

ORDER AMENDING OPINION

It is ORDERED that the last sentence on Page 7 of the slip opinion be changed to read as follows:

"The memorandum and order of the district court will be vacated."

BY THE COURT

COLLINS J. SEITZ
Chief Judge

DATED: August 25, 1980

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GILBERT JOHNSON, and HERVEY JOHNSON, individually and derivatively on behalf of PENN EASTERN DEVELOPMENT COMPANY,

Petitioners

No. 79-1284 vs.

DANIEL H. HUYETT, 3RD, United States District Judge for the Eastern District of Pennsylvania,

Respondent

PETITION FOR WRIT OF MANDAMUS

Argued June 4, 1979—Opinion Filed June 29, 1979

Before ADAMS and ROSENN, *Circuit Judges* and LAYTON, *District Judge**

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* Honorable Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

OPINION OF THE COURT

PER CURIAM

We are presented with a petition for a writ of mandamus arising from the denial by the trial judge of a motion for recusal filed pursuant to 28 U.S.C. § 144 (1976). We believe that the Third Circuit requirements for a writ of mandamus to order recusal of a district court judge have not been met and we therefore deny the petition.

The underlying cause of action in this case is a suit brought in April, 1976 by Gilbert and Hervey Johnson individually and derivatively on behalf of Penn Eastern Development Company ("Penn Eastern"). The suit, alleging breach of fiduciary obligations, was brought against directors and majority shareholders of Penn Eastern. The case has proceeded intermittently before Judge Daniel H. Huyett, 3rd, with several delays and two mistrials. *Ex parte* settlement discussions were held during which, according to the petitioners' affidavit, certain statements were made by Judge Huyett evidencing a bias against the plaintiffs. On February 15, 1979, prior to the commencement of the jury trial, the plaintiffs filed a motion for recusal under 28 U.S.C. § 144. The motion referred to the comments made by Judge Huyett and a pattern of conduct which plaintiffs believed showed a personal bias against them. The motion was denied in an oral opinion from the bench on February 22, 1979. Judge Huyett also declined to recuse himself pursuant to 28 U.S.C. § 455. This petition for a writ of mandamus was then filed under 28 U.S.C. § 1651(a) (1976), while trial commenced in the district court. At the time of oral argument in this case, fifty-four days of trial already had been held.

The initial question to be decided by us is whether it is appropriate for this court to invoke the drastic remedy of the writ of mandamus in this type of case. The rule in this circuit is that writs will issue in recusal cases only when extraordinary circumstances are present. *Green v. Murphy*, 259 F.2d 591 (3d Cir. 1958) (*en banc*).

The rule that we are governed by is more restrictive than the rules in other circuits. *See, e.g., In re Union Leader Corp.*, 292 F.2d 381, 384 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); and cases cited in 9 Moore's Federal Practice ¶110.13[10].

Although a persuasive case might be made for relaxing the requirements of *Green*, that decision is controlling unless overruled by this court sitting in banc. Third Circuit Internal Operating Procedures, Chapter VIII, C. We believe that in the situation presented here the extraordinary circumstances required by *Green* are not present. At this late stage in the proceedings, after 54 days of trial, raising the issue on direct appeal after verdict (if petitioners lose) is a sufficiently adequate remedy. The petition for a writ of mandamus will, therefore, be denied.

Cost to be taxed against petitioners.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants

(D. C. Civil No. 76-1002)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ROSENN and HIGGINBOTHAM, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 18, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 3, 1979, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ SALLY MRVOS
Clerk

July 31, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1892

GILBERT P. JOHNSON, and
HERVEY M. JOHNSON,

Appellants

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants

(D. C. Civil No. 76-1002)

Present: SEITZ, *Chief Judge* and ROSENN and HIGGINBOTHAM, *Circuit Judges*.

ORDER

Ordered that appellants' petition for rehearing before the original panel is hereby denied.

/s/ SEITZ
Chief Judge

DATED: September 3, 1980

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SALLY MRVOS
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1892

GILBERT P. JOHNSON, and
HERVEY M. JOHNSON,

v.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, and PENN EASTERN DEVELOPMENT COMPANY and HARVEY SALWEN,

Gilbert Johnson and Hervey Johnson, individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants

(D. C. Civil No. 76-1002)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

DATED: October 2, 1980

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2525

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation, plaintiffs above named, and their counsel *pro hac vice* below, Myron M. Cherry,

Appellants

(D. C. Civil No. 76-1002)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ROSENN and HIGGINBOTHAM, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 18, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 19, 1979, be, and the same is hereby vacated.

ATTEST:

/s/ SALLY MRVOS
Clerk

July 31, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2525

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation, plaintiffs above named, and their counsel *pro hac vice* below, Myron M. Cherry,

Appellants

(D. C. Civil No. 76-1002)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ROSENN and HIGGINBOTHAM, *Circuit Judges*.

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 18, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the memorandum and order of the said District Court, filed July 19, 1979, be, and the same is hereby vacated.

ATTEST:

/s/ SALLY MRVOS
Clerk

August 25, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1284

GILBERT JOHNSON, and HERVEY JOHNSON, individually and derivatively on behalf of PENN EASTERN DEVELOPMENT COMPANY,

Petitioners

vs.

DANIEL H. HUYETT, 3RD, United States District Judge for the Eastern District of Pennsylvania,

Respondent

Present: ADAMS and ROSENN, *Circuit Judges* and LAYTON, *District Judge*.*

Upon consideration of petitioners' petition for writ of mandamus and answer of defendants-respondents in opposition thereto, and after full briefing, all in the above-entitled case,

It is ORDERED that petitioners' petition for writ of mandamus be, and hereby is denied, in accordance with the opinion of this Court. Costs are taxed against petitioners.

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: June 29, 1979

* Honorable Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1284

GILBERT JOHNSON, et al.,

Petitioners

v.

DANIEL H. HUYETT, 3rd,

Respondent

SUR PETITION FOR REHEARING

Present: SEITZ, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges*, and LAYTON, *District Judge**

The petition for rehearing filed by petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ M. ROSENN
Judge

Dated: August 27, 1979

* Sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 15, 1979

No. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants

To: CLERK, U.S. Court of Appeals, Third Circuit.

1. Appellants' motion for leave to file a deferred appendix pursuant to Rule 30(c) F.R.A.P., *with* Affidavit of Myron M. Cherry, Esquire,
2. Appellees' answer in opposition to appellants' motion for leave to file a deferred appendix, *with* Affidavit of Steven E. Angstreich, Esquire,

in the above-entitled case.

Respectfully,

/s/ MATTHEW GRAILEY
Deputy Clerk

enc.
kg

The foregoing Motion is denied, without prejudice to the right of counsel for appellants to seek a reasonable extension of time to file brief for appellant and the

appendix. An appendix conforming to the requirements of Rule 30(a), F.R.A.P., is to be filed and served.

For the Court,

/s/ _____
Clerk

Dated: August 15, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 25, 1979

No. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation,
Appellants

(D. C. Civil No. 76-1002)

Present: ALDISERT and HUNTER, *Circuit Judges*.

1. Appellants' motion for an extension of time in which to file brief and appendix thirty (30) days after receipt of all trial transcript, *with* Affidavit of Myron M. Cherry, Esquire and Philip Feldman, Court Reporter,
2. Appellees' Answer in opposition to appellants' motion for an extension of time in which to file

brief and appendix, *with* Affidavit of Steven E. Angstreich, Esquire,

3. Appellees' motion to strike entry of appearance of Jerome J. Shestack, Esquire, filed on behalf of Myron M. Cherry, Esq., for the reason that Myron M. Cherry, Esquire, is not a party to the instant appeal,
4. Appellants' Memorandum in opposition to appellees' motion to strike entry of appearance of Jerome J. Shestack, Esquire,
5. Appellants' rely to appellees' answer to appellants' motion for an extension of time in which to file brief and appendix,

(Not filed unless Court directs)

in the above-entitled case.

Respectfully,

enc.
ald

/s/ T. E. QUINN
Clerk

The foregoing Motion of appellant [*sic*] is denied; appellant is given 45 days from date of this order to file brief and appendix; no further extension will be granted.

Appellee's motion to strike appearance in motion (3) is denied.

By the Court,

/s/ ALDISERT
Judge

Dated: October 4, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 25, 1979

No. 79-1892

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants.

(D. C. Civil No. 76-1002)

Present: ALDISERT and HUNTER, Circuit Judges.

1. Motion by Myron M. Cherry, Esquire, counsel for appellants, for an order staying the order of the District Court entered on July 19, 1979 pending appeal, and for an expedited hearing on said motion,

in the above-entitled case.

Respectfully,
/s/ T. F. QUINN
Clerk

ald.
enc.

The foregoing Motion is denied.

By the Court,
/s/ ALDISERT
Judge

Dated: October 4, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1892

October 26, 1979

JOHNSON, GILBERT P. and
JOHNSON, HERVEY M.

vs.

SAMUEL J. TRUEBLOOD, ARNOLD E. TRUEBLOOD, HARVEY I. SALWEN, and PENN EASTERN DEVELOPMENT COMPANY

Gilbert Johnson and Hervey Johnson, Individually and derivatively on behalf of Penn Eastern Development Corporation,

Appellants

(D. C. Civil No. 76-1002)

Present: ALDISERT and HUNTER, Circuit Judges.

1. Appellants' emergency motion for an order directing the Official Court Reporter below to complete transcription of trial notes on or before November 12, 1979,
2. Copies of this Court's orders both dated October 4, 1979 [*see* App. 52-54], sent by the undersigned for Court's information,

in the above-entitled case.

Respectfully,

enc. /s/ T. F. QUINN
fn *Clerk*

The foregoing Motion is denied.

By the Court,

/s/ ALDISERT
Judge

Dated: November 5, 1979

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 753 provides:

> **§ 753. Reporters**
>
> (a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.
>
> The number of reporters shall be determined by the Judicial Conference of the United States.
>
> The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.
>
> Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized

number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection

with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauleris shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial

question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

(g) If, upon the advice of the chief judge of any district court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such district court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters of such district court should be provided the judges of such district court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, the Director of the Administrative Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with any suitable person, firm, association, or corporation for the providing of court reporters to serve such district court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the district court, will best serve the needs of such district court.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

F. R. App. P. Rule 10 provides:

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. (1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included.

Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed

statement may be filed as the appendix required by Rule 30.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

F. R. Civ. P. Rule 15 provides:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they

shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.